BYU Law Review

Volume 2013 | Issue 5 Article 4

2-28-2014

Trans-Substantivity and the Processes of American Law

David Marcus

Trans-Substantivity and the Processes of American Law

*David Marcus**

ABSTRACT

The term "trans-substantive" refers to doctrine that, in form and manner of application, does not vary from one substantive context to the next. Trans-substantivity has long influenced the design of the law of civil procedure, and whether the principle should continue to do so has prompted a lot of debate among scholars. But this focus on civil procedure is too narrow. Doctrines that regulate all the processes of American law, from civil litigation to public administration, often hew to a trans-substantive norm. This Article draws upon administrative law, the doctrine of statutory interpretation, and the law of civil procedure to offer a more complete account of trans-substantivity that explains the principle in all of the contexts in which it surfaces. This inquiry leads to a novel defense of trans-substantivity as a principle of doctrinal design. Trans-substantivity is justified as a response to deficits in the performance of institutions that craft and administer interpretive, procedural, and administrative law. This defense not only challenges the prevailing skepticism in procedural scholarship regarding the principle's normative appeal. It also provides a metric to determine when doctrine should remain trans-substantive, and when doctrine may legitimately splinter into substance-specific strains.

---

* Professor of Law, University of Arizona Rogers College of Law. This Article benefited from presentations at Denver University, the University of Arizona, the University of California-Davis, and Yale Law School. I received invaluable comments from Todd Aagaard, Bruce Ackerman, Derek Bambauer, Jane Bambauer, Bob Ellickson, Bill Eskridge, Heather Gerken, John Langbein, Daniel Markovits, Toni Massaro, Nina Rabin, Judith Resnik, Roy Spece, and John Witt.

INTRODUCTION

Frank Ricci's suit for employment discrimination against the New Haven Fire Department was extraordinary.[1] Very few cases get to the U.S. Supreme Court, much less remake an emotionally-charged, often-politicized area of law. But the suit was also ordinary. Ricci first requested help from the Equal Employment Opportunity Commission (EEOC), as 80,000 people do each year.[2] He then commenced a lawsuit in the District of Connecticut using a form of

1. *See* Ricci v. DeStefano, 557 U.S. 557 (2009).

2. *Charge Statistics FY 1997 Through FY 2011*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Oct. 16, 2013).

complaint that differed in no material respect from one for a simple tort action or another for complicated antitrust claims.[3] To decipher Title VII of the Civil Rights Act of 1964, the Supreme Court majority invoked the same canon of construction that the Court had deployed two days before the opinion's release to interpret the False Claims Act,[4] and that a federal district court would use the next day for the Wiretap Act of 1968.[5] The various courts handling Ricci's case also had to figure out what deference they owed to the EEOC's interpretation of Title VII, a problem of the sort that the Supreme Court has encountered over one thousand times since the mid-1980s, in cases involving a vast array of agency actions.[6]

Something interesting lies in this ordinariness. Title VII may have provided the relevant legal regime to determine whether the NHFD's promotion practices injured Ricci. But three species of doctrine—the law of federal civil procedure, federal administrative law, and statutory interpretation doctrine—regulated the processes by which the EEOC and several federal courts resolved his dispute. Many of the rules that constitute these species are trans-substantive: these rules' form and manner of application do not vary depending upon the antecedent legal regime that the dispute implicates, whether it is Title VII, the Sherman Act, or Connecticut tort doctrine. To support its use of the interpretive canon, the Supreme Court in *Ricci v. Destefano* cited a case involving the allocation of liability for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.[7] A dissenting justice used a deference standard for the EEOC's interpretation of Title VII that originated in a case involving the Interstate Commerce Commission and the Interstate Commerce Act.[8] Ricci styled his complaint pursuant to a generic rule that does not impose any

3. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002).

4. United States ex rel. Eisenstein v. City of New York, 556 U.S. 928, 933 (2009) (using the rule against surplusage).

5. United States v. Szymuszkiewicz, No. 07-CR-171, 2009 WL 1873657, at *10 (E.D. Wis. June 30, 2009).

6. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098 (2008).

7. Ricci v. Destefano, 557 U.S. 557, 580 (2009) (citing United States v. Atlantic Research Corp., 551 U.S. 128, 137 (2007)) (using rule against surplusage).

8. *Id.* at 626 (Ginsburg, J., dissenting) (citing a deference standard set in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971), which in turn cited *United States v. City of Chicago*, 400 U.S. 8 (1970)).

particular pleading obligation on employment discrimination plaintiffs.[9]

Trans-substantivity is one of the most fundamental principles of doctrinal design for modern civil procedure,[10] and it has prompted an extensive body of commentary since Robert Cover coined the term in 1975.[11] Although abundant, this literature suffers from two significant and related limitations. First, with few exceptions, scholars have examined trans-substantivity exclusively as the principle influences the development and form of procedural doctrine.[12] This focus is too narrow. The legal processes of court-based litigation and public administration constantly intersect and overlap, as they did for Ricci, and trans-substantive rules often govern administrative and interpretive issues, not just procedural ones. Trans-substantivity is a phenomenon of process generally-conceived, not just one of court-based procedure.

The second shortcoming follows from the first. Consistent with their constrained gaze, commentators have evaluated trans-substantivity in terms of problems of civil procedure and their possible solutions. Some have argued, for example, that the principle's rigidity creates regrettable litigation costs, because trans-substantive doctrine produces wasteful discovery in cases that would proceed better if governed by tailored rules.[13] This sort of analysis,

9. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002).

10. *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 536 [hereinafter Burbank, *General Rules*].

11. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); *see also* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 375–76 nn.25–26 (2010) [hereinafter Marcus, *Trans-Substantivity*] (citing articles).

12. Administrative law scholarship includes plenty of discussion of what doctrine should be in specialized areas like patent or tax law, but not systematic inquiries into trans-substantivity more generally. *See, e.g.*, Sarah Tran, *Administrative Law, Patents, and Distorted Rules*, 80 GEO. WASH. L. REV. 831 (2012); Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269 (2007). A couple of studies of trans-substantivity in criminal procedure have been written. *See, e.g.*, William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001). One scholar of statutory interpretation has questioned his field's trans-substantive assumption, but in a way that uses the term "trans-substantive" differently than I do here. *See* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1025 (1998) (arguing against "trans-substantive" interpretive doctrine, but implicitly suggesting that "administrative law" is a substance-specific category). Otherwise, the term "trans-substantive" tends to be used casually, without much discussion, except in procedural scholarship.

13. Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective*

however valuable, is incomplete. Trans-substantive doctrine regulates aspects of all sorts of processes, judicial and administrative alike, and concerns particular to the procedural regulation of civil litigation do not exhaust the range of justifications for or arguments against the principle.

This Article is the first to explain and defend trans-substantivity as it influences the design of what I call "process law," a category that includes the various species of doctrine that govern decision-making processes in American law. I make three contributions. First, I offer a more complete and accurate account of the principle than those found in previous scholarly efforts, which have described trans-substantivity solely in terms of civil procedure.

Second, by inquiring into the reasons for and against the principle in process law generally and not civil procedure narrowly, I move past decades-old debates over the normative justification for trans-substantivity and arrive at a novel defense of its persistence. Trans-substantivity, I argue, responds to a set of institutional deficits that can degrade the quality of procedural, interpretive, and administrative doctrine *that judges fashion*. The principle strengthens the legitimacy of this process law, protects it from inexpert or biased manipulation, and enables it more effectively to achieve desired policy objectives. Rooted in observations about comparative institutional competence, my justification challenges the prevailing skepticism regarding the normative appeal of trans-substantivity.[14]

Third, my justification for trans-substantivity has important implications for doctrinal design. Process law is by no means uniformly trans-substantive, as illustrated by the particularized pleading standard that applies in securities fraud litigation,[15] or the idiosyncratic interpretive practices courts use for the Taft-Hartley Act.[16] A recurring and important question for the development of procedural, interpretive, and administrative law asks whether a

Substance-Specific Procedure, 46 FLA. L. REV. 27, 45–46 (1994).

14. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 334 (2008) (arguing that "the optimal level of generality" for procedural rules "should be determined not by reference to some trans-substantive ideal, but by balancing the costs and benefits of general versus more specific rules").

15. *See* 15 U.S.C. § 78u–4(b)(1)(B) (2006).

16. *E.g.*, Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common-Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW (Shyam Balganesh ed., forthcoming 2013) (draft at 1–2).

particular doctrine should remain trans-substantive or assume a substance-specific form. Commentary on trans-substantivity that covers only procedural terrain provides no general metric to guide responses. My account offers a way to evaluate the legitimacy of substance-specific process law that judges craft. As courts make this doctrine, they can properly deviate from the trans-substantive norm under circumstances that enable them to overcome the institutional limitations that otherwise counsel in favor of trans-substantivity.

My Article proceeds as follows. In Part I, I define "process law," defend my choice to treat trans-substantivity as a phenomenon of process law generally, and explore the meaning of "trans-substantivity." I describe trans-substantivity's entrenchment in mid-twentieth century procedural and administrative doctrine in Part II. This history is relevant for two reasons. The similar courses the principle followed in procedural and administrative contexts confirm that trans-substantivity emerges from and responds to forces that are not peculiar to civil procedure. Also, institutions and their constraints play a significant role in trans-substantivity's twentieth century experience, a fact that should at least inform an account of the principle going forward. The history leads to Part III, in which I offer my institutional justification for trans-substantivity in judge-made process law. I close in Part IV with some implications that my account has for the design of procedural, administrative, and interpretive doctrine.

I. TRANS-SUBSTANTIVITIES

Process law is a new term, and I need to explain why it offers a useful and coherent category for the analysis of trans-substantivity in procedural, interpretive, and administrative doctrine. In this Part, I define "process law" and give several reasons to support an account of trans-substantivity pitched at its level. I also explain what I mean by "trans-substantivity," a shape-shifting term that lacks a settled meaning in existing commentary.

A. Process Law

1. The term

A lot of law—Equal Protection doctrine,[17] Fourth Amendment jurisprudence,[18] remedies law,[19] and the National Environmental Policy Act (NEPA),[20] for instance—gets saddled with the label "trans-substantive." Even tort law arguably qualifies. Negligence purports to cover many varieties of unintended interactions, ranging from surgical mishaps to car crashes. If each type of accident constitutes its own substantive category, then tort law is trans-substantive. An attempt to explain the principle everywhere it arguably surfaces would quickly spin out of control, or at best yield little more than the trivial observation that legal categorization requires abstraction.

I limit my study of trans-substantivity to its many manifestations in what I call "process law." Procedural, administrative, and interpretive doctrine all regulate the legal processes of public administration and court-based litigation. An event or set of circumstances with potential legal meaning or significance happens or evolves. A legal process begins in order to resolve this uncertain state of affairs. Public processes[21] include civil litigation like the case Ricci pursued. They also include various types of agency actions, ranging from informal rule-making to decisions by customs agents to fix tariffs for imports at ports of entry. The law that regulates these processes is, logically enough, what I mean by "process law."[22]

---

17. *See* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1573 (2002).

18. Stuntz, *supra* note 12, at 842.

19. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391–94 (2006) (applying "well-established principles of equity" to determine when an injunction might be issued, and implying that different principles should not apply in patent cases); EDWARD D. RE & JOSEPH R. RE, REMEDIES: CASES AND MATERIALS, at xv–xxiv (6th ed. 2005) (organizing the subject of remedies around substantive categories). *But cf.* David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 631–32 (1988) (arguing that remedies law is "compartmentalized" based on substance but should not be).

20. E. Gates Garrity-Rokous, Note, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 YALE L.J. 643, 659 n.108 (1991) (describing NEPA as trans-substantive).

21. Plenty of legal processes, like mediation and arbitration, are private. I exclude them from my analysis and only address public processes.

22. This definition excludes remedies law, which doesn't regulate legal processes but

I use this term instead of "procedure," the obvious alternative, for several reasons. "Procedure" has connotations that do not reflect what process law encompasses and what it does. The ordinary meaning of "procedure," for example, usually does not include interpretive doctrine.[23] Also, "procedure" conjures up the substance/procedure divide, a dichotomy that does not account for the problems that process law often confronts. A process is legal because it implicates an antecedent regime of law, like Title VII in Ricci's case. Many of the challenges that process law encounters arise from its intersection with the antecedent regime. Should a federal court apply New York's rule that prohibits class actions for the enforcement of a particular insurance law, or does Rule 23 preempt state law?[24] The procedural determination has obvious substantive ramifications, and thus the problem may fairly be understood as one involving the collision between "substance" and "procedure."[25]

But analogous problems arising in legal processes often have nothing to do with procedure's relation to substance. Process law can uncomfortably intersect with antecedent regimes that themselves are entirely procedural. The Class Action Fairness Act (CAFA), for example, provides that, upon a case's removal to federal court, a plaintiff can appeal "not less than 7 days" after the district court denies her motion to remand.[26] This language appears to authorize an indefinite time to appeal and, as such, is a drafting error. "Less" in this instance really means "more."[27] But the fact that

instead is in some fashion the concrete actualization of substantive law. *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 51–52 (1979) (describing remedies as the means for actualizing rights upon their articulation); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678–79 (1983) (arguing that remedial possibilities shape the articulation of constitutional rights); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 931 (1999) ("When a common law court decides rules about what constitutes a breach of a contract or a tort, and when it decides what remedy is warranted for the breach or tort, . . . the two decisions are based on the same sorts of considerations.").

23. By interpretation I do not mean to refer to interpretation in the literary theory sense of the term. By this meaning of interpretation, adjudication is arguably a form of interpretation. *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982).

24. *See generally* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

25. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 68–74 (2010).

26. 28 U.S.C. § 1453(c)(1) (2006).

27. Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117,

one would conventionally describe the antecedent regime (CAFA's removal provision) as procedural does not lessen the difficulty courts encounter as they deploy interpretive doctrine to make sense of the statute.[28] The problem involves a clash of institutional prerogatives: does process doctrine—in this instance practices of statutory interpretation—give courts legitimate authority to rewrite an otherwise-clear text Congress enacted?

A better description of process law, one that gets beyond the substance/procedure dichotomy, defines it, first, in terms of a relational trait, and second, in terms of the tasks that process law discharges. The relational trait has to do with process law's necessary connection to an antecedent legal regime. Before a rule of process law has any operational meaning, in terms of how it affects decision-maker or participant behavior, a set of circumstances implicating some legal regime must emerge. Some sort of legal process must commence to resolve authoritatively these circumstances' legal significance. An example comes from statutory interpretation. The *ejusdem generis* canon provides that the meaning of a general term at the end of a list in a section of a statute takes on the meaning of the more precise terms that precede it.[29] On its own, the canon has no real meaning. Once a merchant plans to build a gas station in Montgomery Township, Pennsylvania, however, the canon becomes important. A zoning ordinance there permits the operation of "shops, stores, or other indoor facilities."[30] Whether a gas station qualifies as an "indoor facility" may depend on the canon's application.[31]

Process law is also distinguishable in terms of the two types of tasks it discharges. The first type of task is incontestably procedural. The time FRCP 4 gives a defendant to answer a complaint is an example. By no understanding of the term "substance" could the rule, concerned entirely with the fairness and efficiency of civil litigation, qualify. The second type of task helps to distinguish law

137–42 (2009).

28. *See generally* Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092 (9th Cir. 2006) (reporting opinion of five judges dissenting from Ninth Circuit's refusal to rehear en banc a case involving the interpretation of this text).

29. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 253–54 (2000).

30. In re Costco Wholesale Corp., 49 A.3d 535, 538 (Pa. Commw. Ct. 2012).

31. *Id.* at 540 (discussing *ejusdem generis*).

that regulates some sort of procedure but is not properly understood as process law. If some doctrine performs a function that is not incontestably procedural, it qualifies as process law only if the rights the doctrine creates or the obligations or duties the doctrine imposes necessarily derive, at least in part, from the antecedent regime.

The heightened pleading standard the Private Securities Litigation Reform Act prescribes for securities fraud claims, for example, counts as process law. The pleading standard cloaks substantive policy in procedural guise and thus uncomfortably straddles the substance/procedure divide.[32] But the pleading standard has operational significance only upon the occurrence of a set of circumstances that might implicate the federal securities laws, the relevant antecedent regime. Moreover, although the standard is not incontestably procedural, a court cannot determine whether a plaintiff has met the obligations it imposes without reference to federal securities laws (the antecedent regime). NEPA, in contrast, does not qualify as process law. NEPA obliges the federal government to provide an environmental impact statement (EIS) when the government wants to take certain actions "significantly affecting the quality of the human environment."[33] NEPA applies when an agency wants to take some action pursuant to some other statutory authority, and in this sense NEPA arguably requires an antecedent legal regime to have operational significance. Few would describe NEPA as incontestably procedural, since it serves environmental policy objectives and does not simply concern itself with the fairness or efficiency of some legal process. Also, its objectives are not externally-determined. A decision-maker can decide whether an agency satisfied its obligations under NEPA without reference to the antecedent regime.[34]

32. *E.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 223 (2004) ("The PSLRA . . . involve[s] a deliberate crossing of the line between substance and procedure.").

33. 42 U.S.C. § 4332 (2006).

34. Recent Ninth Circuit opinions applying the EIS requirement are illustrative. In none of them did the court anchor the EIS requirement to some other legal obligation and instead evaluated the government's behavior according to NEPA itself. Alcoa, Inc. v. Bonneville Power Admin., 698 F.3d 774, 795–96 (9th Cir. 2012); Earth Island Inst. v. U.S. Forest Serv., 697 F.3d 1010, 1019 (9th Cir. 2012); Pacific Coast Fed'n of Fishermen's Ass'ns v. Blank, 693 F.3d 1084, 1100–03 (9th Cir. 2012); Ctr. for Biological Diversity v. Salazar, 695 F.3d 893, 913–14 (9th Cir. 2012); League of Wilderness Defenders–Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1068–69 (9th Cir. 2012).

2. Trans-substantivity as a process law principle

For five reasons, I offer my analysis of trans-substantivity at the level of process law, as a category embracing procedural, administrative, and interpretive doctrine.[35] First, each of these species includes a lot of doctrine that is incontrovertibly trans-substantive. Again, tort law is trans-substantive if "surgical operations" and "automobile accidents" count as substantive categories. But if the proper category is "tort," then tort law is substance-specific. In contrast, regardless of how one conceptualizes substantive categories, trans-substantive doctrine composes significant swaths of each species of process law. The realist Leon Green famously removed arguably trans-substantive abstractions like "negligence" and "strict liability" from his torts casebook, replacing them with "keeping of animals," "timber, crops, minerals," and other such categories.[36] Charles Alan Wright identified his treatise on federal practice as a realist equivalent for civil procedure,[37] yet it remains organized in trans-substantive terms. Perhaps trans-substantivity is more central to doctrinal design of process law than it is elsewhere.

Second, while court-based litigation and public administration may differ in some fundamental ways, they often overlap, they often merge, and they often are treated as equivalents for the pursuit of regulatory goals.[38] Ricci's case, involving first agency action and then court-based litigation, is a good example of the sort of routine overlap in the American regulatory state.[39] Securities enforcement

35. Two other species of process law include evidence law and criminal procedure doctrine. *See infra* note 59.

36. LEON GREEN, THE JUDICIAL PROCESS IN TORTS CASES, at ix–xi (2d ed. 1931).

37. *See* Brian Leiter, *A Potted History of American Legal Education and Scholarship in the 20th-Century*, BRIAN LEITER'S LAW SCHOOL REPORTS (Oct. 15, 2012, 6:52 PM), http://leiterlawschool.typepad.com/leiter/2012/10/a-potted-history-of-american-legal-education-and-scholarship-in-the-20th-century-with-special-refere.html.

38. Legal economists understand them in this way. *See generally* SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 120–22 (1992); Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts), in* REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11 (Daniel P. Kessler ed., 2011); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984). Policymakers often do as well, as when they consciously opt for private litigation instead of bureaucratic enforcement for a particular regulatory regime. SEAN FARHANG, THE LITIGATION STATE 15 (2010).

39. About one-third of the non-criminal cases pending in the U.S. Courts of Appeals as of October 1, 2010 were direct appeals from administrative agencies. ADMIN. OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES

illustrates merger, or instances when public administration proceeds as court-based litigation. In FY 2009, for example, the Securities and Exchange Commission brought 47% of its enforcement actions as civil lawsuits,[40] pursuant to an organic act that gives the agency total discretion to choose between judicial and administrative fora.[41] If litigation and public administration often relate so closely, then there is a good chance that similar problems arise during each process, giving rise to similar process law doctrines. The fact that these doctrines share a trait as fundamental as trans-substantivity seems jurisprudentially-meaningful, not just incidental.

Third, as I argue in Part III, courts craft a lot of process law, even in judicial systems whose judges do not enjoy broad lawmaking powers.[42] This similarity is important once paired with the fourth reason for process law as a proper category for study. All species of process law enable decision-makers to affect how legal processes realize or interfere with the policy objectives antecedent regimes ostensibly serve. What an antecedent regime accomplishes can depend, for example, on whether a decision-maker grants class certification or uses the avoidance doctrine. Whether and how a decision-maker can legitimately adjust the antecedent regime with process law may depend on the decision-maker's identity and its relationship with other lawmaking institutions. Courts, for instance, manifest anxiety when they use process law explicitly to alter an antecedent regime. The absurdity doctrine enables courts to take statutory language that does not make sense and construe it to mean something that it as a textual matter cannot possibly mean. CAFA's

COURTS 84 tbl. B-1 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/Judicial Business/2010/JudicialBusinespdfversion.pdf. Twenty-eight percent of the civil actions filed in the U.S District Courts in the year ending September 30, 2010, were classified as civil rights actions, prisoner civil rights actions, prison conditions actions, forfeiture actions, immigration actions, social security actions, and tax actions, and thus involved a federal agency in one way or the other. *Id.* at 144–46 tbl. C-2. This figure assuredly undercounts the number of cases emerging from an agency setting by a significant margin, as it excludes categories of cases that do not necessarily involve agencies but often do. These include, for example, cases classified as environmental actions and labor law actions, as well as the sizeable number of contract and property cases involving the federal government as a litigant in some manner. *See id.*

40. U.S. SEC. & EXCH. COMM'N, SELECT SEC AND MARKET DATA, FISCAL 2009, at 3, *available at* http://www.sec.gov/about/secstats2009.pdf.

41. *See, e.g.*, Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 249 (1990).

42. Federal courts craft a lot of process law, even as they lack general common-lawmaking powers. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

"less," for example, can mean "more" upon the application of the absurdity doctrine.[43] Whe courts deploy the doctrine, however, they deny that they are rewriting the statute and insist instead that they remain faithful to real legislative intent.[44]

The opportunities that all varieties of process law create for the adjustment of antecedent regimes, and the limits on judicial power to use process law accordingly, counsel in favor of a justification for trans-substantivity. I describe this justification in Part III, but for the moment the relevant claim is that the justification works equally well for procedural, interpretive, and administrative doctrine.

Fifth, the trans-substantive tendencies in procedural and administrative doctrine share parallel histories, as I recount in Part II. These histories suggest that the reasons for the principle's manifestation in each species may be similar. A failure to connect trans-substantivity in procedural doctrine to trans-substantivity in administrative doctrine may result in incomplete understandings of the phenomenon and thus only partial critiques of its persistence.

B. The Trans-Substantivity Spectrum in Process Law

"Trans-substantivity" is not a new term like "process law," but it also needs elaboration. What counts as a trans-substantive rule of process law may lie in the eye of the beholder, as the term gets assigned a lot of meanings. The *Manual for Complex Litigation* is a semi-official publication authored by the Federal Judicial Center that advises judges on how to handle class actions and other complex litigation. Part of the *Manual* organizes strategies for the management of large cases around substantive categories.[45] Some point to the *Manual* as evidence of a slide toward substance-specificity in procedural doctrine.[46] But the *Manual* does not steer procedural doctrine into substance-specific enclaves. It has no formal authority to establish or alter doctrine. Rather, the *Manual* suggests that nominally trans-substantive rules can lend themselves to patterns of application organized around particular antecedent

43. *E.g.*, Miedema v. Maytag Corp., 450 F.3d 1322, 1326 (11th Cir. 2006) (citing cases).

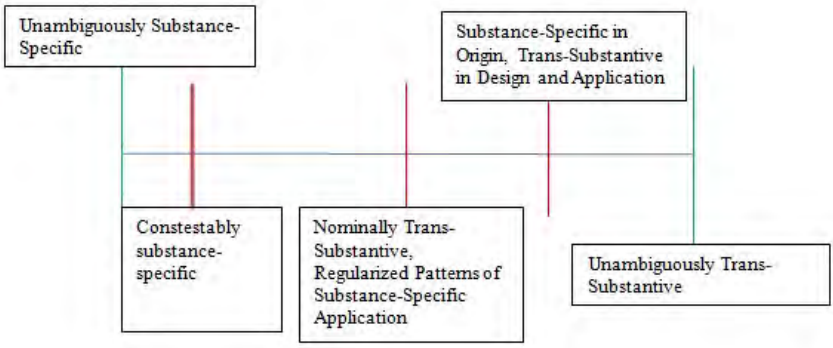
44. *E.g.*, State ex rel. Z.C., 165 P.3d 1206, 1209 (Utah 2007). On the absurdity doctrine and legislative intent more generally, see John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2400–03 (2003).

45. MANUAL FOR COMPLEX LITIGATION, FOURTH 517–724 (2004).

46. Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1505 (1992) (describing the *Manual* as "a monument to non-trans-substantivity").

regimes. This tendency may weaken the trans-substantive character of federal procedural doctrine. But the *Manual* differs in kind from something like the special pleading standard that applies in securities fraud litigation, which formally departs from the trans-substantive norm in federal procedure.

Trans-substantivity is a matter of degree, as the following diagram indicates:



A process rule is *unambiguously substance-specific* if a lawmaker explicitly designs it with reference to a particular antecedent regime and if it only gets used in legal processes that involve that regime. Examples are the canon of construction that instructs courts to construe exemptions to the antitrust laws narrowly,[47] and the requirement that administrative law judges issue reasoned decisions for social security disability benefit determinations.[48]

At one time, the Sixth Circuit required plaintiffs in prison civil rights cases plead that they had exhausted administrative remedies in their complaints. This requirement is another example of an unambiguously substance-specific rule.[49] It amounted to an elaboration on Rule 8 of the Federal Rules of Civil Procedure ("FRCP"), the generic federal pleading requirement. One might thus characterize the Sixth Circuit's pleading requirement as a substance-specific application of a nominally trans-substantive rule. For

47. *E.g.*, United States v. Gosselin World Wide Moving, N.V., 411 F.3d 502, 509 (4th Cir. 2005).

48. 42 U.S.C. § 405(b) (2006).

49. Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998). *But cf.* Jones v. Bock, 549 U.S. 199, 211 (2007) (reversing the Sixth Circuit in another case).

prisoners litigating within the Sixth Circuit, however, the exhaustion requirement had hardened into the operative pleading standard, in effect replacing Rule 8's nonspecific terms with precise and mandatory instructions plaintiffs had to follow upon pain of dismissal.

Contestably substance-specific process law is the next category along the spectrum. This category includes doctrine defined by reference to a body of law that itself is not process law but is otherwise arguably trans-substantive. Rule 22 of the Federal Rules of Appellate Procedure provides an example. It regulates appeals in habeas corpus cases. If habeas corpus law is a distinct substantive category, then Rule 22 is substance-specific. But habeas corpus law may be trans-substantive, since it involves a variety of antecedent regimes, including criminal law and immigration law. If these discrete regimes are the relevant substantive categories, then Rule 22 is trans-substantive, since it regulates habeas appeals of petitioners challenging criminal convictions as well as immigration detention.

Further along the spectrum is process law that decision-makers articulate in trans-substantive terms, but that lends itself to *regular patterns of application* that vary based upon the antecedent regime involved. The procedural due process balancing test in *Mathews v. Eldridge* is an example.[50] The factors that determine how much process is due in particular instances involving a threatened liberty or property interest include "the private interest that will be affected by the official action" and "the Government's interest."[51] These inputs have no stated connection to any particular antecedent regime. But the test generates regularized patterns of results that organize themselves around substantive contexts. These results readily morph into unambiguously substance-specific doctrine once an authoritative decision-maker determines how the test balances out for a particular antecedent regime. A tailored rule, not the *Mathews v. Eldridge* balancing test, now determines whether an indigent defendant in a civil contempt proceeding gets a court-appointed lawyer, because the Supreme Court has addressed this situation.[52]

50. 424 U.S. 319 (1976).

51. *Id.* at 335.

52. Turner v. Rogers, 131 S. Ct. 2507, 2518 (2011).

Another example is *United States v. Mead Corp.*, which provides a nominally trans-substantive standard to determine which agency interpretations of statutes trigger *Chevron* deference.[53] Once an authoritative decision-maker decides how *Mead* applies to a particular agency's interpretation of a particular statute, the decision becomes an unambiguously substance-specific rule that controls going forward. When a single member of the Board of Immigration Appeals (BIA) writes an unpublished opinion, his or her interpretation of the Immigration and Nationality Act (INA) presently receives no *Chevron* deference from the Third Circuit.[54] This substance-specific rule governs within the Third Circuit, not because *Mead* generates the same result every time, but because the Third Circuit's precedent requires it.

Some nominally trans-substantive rules with routine patterns of application resist this move towards unambiguous substance-specificity. As applied, a type of summary judgment procedure some federal district courts use affects employment discrimination cases differently than the ordinary run of civil actions.[55] But the applicable rule is still trans-substantive. Neither the procedure's terms nor authoritative declarations of how it should apply require particular treatment of employment discrimination cases. Rather, the manner in which the rule interacts with recurring patterns in the litigation of employment discrimination cases produces favorable results for defendants more often than in other substantive contexts.

Closer toward the trans-substantivity end of the spectrum lies doctrine that is articulated in trans-substantive terms and *resists substance-specific patterns of application*, even though its authors devised it for a particular antecedent regime. FRCP 23(b)(2), the provision governing class certification in cases for injunctive relief, is one such example. The rule's creators wrote it for school desegregation litigation.[56] But they codified their intentions in trans-substantive

53. 533 U.S. 218, 227 (2001).

54. De Leon-Ochoa v. Attorney Gen. of the U.S., 622 F.3d 341, 349–50 (3d Cir. 2010).

55. *E.g.*, Letter from Stephen B. Burbank to Peter G. McCabe, Sec'y, Comm. on Rules of Practice and Procedure, at 9–13 (Jan. 28, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2008%20Comments%20Committee%20Folders/CV%20Comments%202008/08-CV-145-Comment-Burbank.pdf; Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 521–22 (2010).

56. David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702–11 (2011).

terms, and since then FRCP 23(b)(2)'s coverage has extended well beyond the civil rights context.[57]

Doctrine is *unambiguously trans-substantive* when it has no substance-specific origins, gets crafted in trans-substantive terms, and does not produce regular patterns of application organized around particular antecedent regimes. The requirement that agencies publish notices of proposed rulemaking in the *Federal Register* is one such rule. The relation-back doctrine, governing the untimely amendment of pleadings, is another. Norms arranging components of a bill's legislative history into a hierarchy of interpretive authority is a third. Doctrines remain unambiguously trans-substantive because the problems they address rarely arise in regularized patterns that vary depending upon the antecedent regime involved. There is little reason to think, for example, that antitrust claims by their nature lead antitrust plaintiffs to file complaints outside limitations periods routinely and thus to require particularized applications of the relation-back doctrine.

As these points along the spectrum indicate, the labels "substance-specific" and "trans-substantive" are too blunt. For the sake of brevity, I will use these terms, however inadequate, throughout this Article. When I refer to "substance-specific" doctrine, I include unambiguously substance-specific doctrine and nominally trans-substantive doctrine that lends itself to regularized patterns of substance-specific application.[58] As I argue in Parts III and IV, rules that fit in these categories pose a unique set of problems to courts as they devise doctrine to regulate legal processes.

II. TRANS-SUBSTANTIVITY'S ENTRENCHMENT IN THE 20TH CENTURY

For some species of process law, trans-substantivity has long served as a central principle of doctrinal design. This is so for evidence law.[59] Trans-substantivity's persistence reflects the long-

57. For an early example, see *Nix v. Grand Lodge of the International Ass'n of Machinists & Aerospace Workers*, 479 F.2d 382 (5th Cir. 1973).

58. I exclude contestably substance-specific doctrine from my analysis. It poses unique complications, because, before one can assess the wisdom of its substance-specificity, one must first determine whether the underlying antecedent regime is itself trans-substantive or substance-specific. This sort of assessment requires a case-by-case determination and is thus beyond the scope of this Article.

59. D. Michael Risinger, *Guilt v. Guiltiness: Are the Right Rules For Trying Factual Innocence*

held belief, voiced prominently by John Henry Wigmore, that "there is no occasion" in evidence law "for a distinction" among various types of cases. "The relation between an Evidentiary Fact and a particular Proposition," Wigmore argued, "is always the same, without regard to the kind of litigation in which that proposition becomes material to be proved."[60] The task of evidence law, in other words, is inherently trans-substantive.[61] Likewise, interpretive doctrine also discharges an inherently trans-substantive task, to the extent that it provides rules of grammar and usage to help vest the incomplete or indeterminate use of language with meaning.[62]

Inevitably the Wrong Rules for Trying Culpability?, 38 SETON HALL L. REV. 885, 886 (2008); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 728–29 (2006).

60. 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 4, at 11 (1904).

61. Sklansky & Yeazell, *supra* note 59, at 731–32. This being said, some evidence law has or may splinter into substance-specific strains. *E.g.*, Myrna S. Raeder, *Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*, 19 CARDOZO L. REV. 1585, 1599–1606 (1998). My sense is that the pressure on evidence law to do so is less than for procedural and administrative doctrine. To the extent that this development proceeds, then my account in Part IV may offer a normative metric to evaluate substance-specific evidence law going forward.

I also exclude criminal procedure from my account of trans-substantivity. It may be trans-substantive. Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 7–22 (2011); Stuntz, *supra* note 12, at 842. *Cf.* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1957 n.1 (2004) (citing sources discussing the issue of substance-specificity in criminal procedure). But I am not sure. If "homicide" and "burglary" are the substantive categories, then criminal procedure is trans-substantive. If "criminal law," like "torts" or "contracts," is the substantive category, then criminal procedure is substance-specific. Unlike evidence law, however, if criminal procedure is trans-substantive, it likely owes its trans-substantivity to the same set of forces that explain the principle in procedural, interpretive, and administrative doctrine. *See* Christopher Slobogin, *Why Crime Severity Analysis is Not Reasonable*, 97 IOWA L. REV. BULL. 1, 2–4 (2012).

62. *E.g.*, THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 225–90 (1857) (summarizing major approaches to statutory interpretation, all of which expressed in trans-substantive terms). This description of interpretive doctrine's *raison d'être* is hardly self-evident. Some textualists might think it so. *E.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25–27 (1998) (discussing semantic canons of construction). But purposivists might not. To them, interpretive doctrines offer guides to legislative purpose, any one of which might be more or less useful in any particular instance. *E.g.*, William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 832 (1985). This understanding of interpretive doctrine is not inherently trans-substantive, and for that reason and others, I believe that interpretive doctrine's trans-substantivity is not as easy to explain as, say, evidence law's trans-substantivity.

The reasons for trans-substantivity in procedural and administrative doctrine may be less intuitive. For these species, the principle has roots that extend into the nineteenth century and, in procedure's case, beyond that. But trans-substantivity's entrenchment in each species as an explicitly-recognized, consciously-pursued, and successful principle of doctrinal design only happened after the New Deal. I explain this development here for two reasons. I mentioned the first in Part I: trans-substantivity's parallel experiences in procedural and administrative settings counsel in favor of an explanation of the principle that is not narrowly-tailored to civil procedure. In addition, this history provides a transition to my discussion of trans-substantivity's present-day justification in Part III. Trans-substantivity's post-New Deal entrenchment had much to do with institutions and their limited competences, considerations that an understanding of trans-substantivity in process law ought to take into account.

A. Trans-Substantivity's Ascendancy

Trans-substantivity emerged in procedural and administrative doctrine before the New Deal.[63] Efforts to sever the link that tethered procedural doctrine to particular common law categories began with Jeremy Bentham and culminated with David Dudley Field's trans-substantive code of civil procedure that New York adopted in 1848. Field's achievement proved so influential that his code, with its trans-substantive design, won recognition as the "American system" of procedure by the end of the nineteenth century.[64] But civil procedure remained connected to substantive categories, even in jurisdictions governed by a version of the Field Code, as lawyers clung to the substance-specific doctrine that the Code ostensibly replaced.[65] Indeed, at the outset of the movement

63. Jeremy Bentham conceived of procedural law as a stand-alone category, denominated "adjective law." Marcus, *Trans-Substantivity*, *supra* note 11, at 384–85 (describing Bentham's category of "adjective law"). The late 19th century treatise writers followed his lead. *E.g.*, WALTER DENTON SMITH, A MANUAL OF ELEMENTARY LAW §§ 165–66 (1896) (defining substantive and adjective law). On trans-substantivity in administrative law before the New Deal, see JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 16, 309 (2012).

64. Marcus, *Trans-Substantivity*, *supra* note 11, at 388–89.

65. *E.g.*, CHARLES A. KEIGWIN, CASES IN CODE PLEADING 25–26 (1926) (describing the persistence of substance-specificity in code pleading); F.W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 295–96 (1913); *see also* Marcus, *Trans-Substantivity*, *supra* note 11, at

that culminated with the FRCP, reformers identified uniformity in procedure as a goal to be achieved, not one to be preserved.[66]

Administrative law, such as it existed at the dawn of the twentieth century,[67] had latent trans-substantive tendencies, but they remained in the background. Agencies developed for themselves "internal laws of administration," and the varieties of self-regulation they devised had similarities from agency-to-agency.[68] But the more visible doctrine regulating administrative processes, involving judicial review of agency action, remained substance-specific. This law included, in important part, claims against agency officials rooted in common law (and hence substance-specific) causes of action.[69]

Trans-substantivity became a central principle of doctrinal design for both species in the 1930s. The increasing complexity of the American legal landscape pressured doctrine in both contexts to move in trans-substantive directions, although the principle's political meaning for administrative law initially differed from what the principle conveyed for procedure. The FRCP's trans-substantivity reflected a central goal their authors pursued—to minimize procedural technicalities and keep the focus of litigation on the substantive merits.[70] Also, the authors wanted to entrench expert, apolitical rulemaking as the preferred mode for procedural reform going forward. As I have explained elsewhere, trans-substantivity

392–94.

66. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1034–50 (1982) (recounting this history).

67. Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1375 (2010) [hereinafter Mashaw, *Gilded Age*] (reporting that nothing was published on administrative law "as such" until 1893); Ann Woolhandler, *Judicial Deference to Administrative Action – A Revisionist History*, 43 ADMIN. L. REV. 197, 197 (1991) (suggesting that after the Interstate Commerce Act of 1887 "a separate body of administrative law" began to be recognized as "a concept").

68. Mashaw, *Gilded Age*, *supra* note 67, at 1466; MASHAW, *supra* note 63, at 309.

69. MASHAW, *supra* note 63, at 3; Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 947–953 (2011); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 407 (2007).

70. *E.g.*, Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase – Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 976 (1937); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 974 (1987); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 497 (2010).

strengthened the case for the neutrality of procedural reform, and thus the legitimacy of doctrinal development outside political arenas.[71] The trans-substantivity of New Deal-era procedure also made it flexible, a *sine qua non* for the changing landscape of American law. The statute-making of the 1930s, and the corresponding shift in the character of civil litigation,[72] made an adaptive procedural regime essential. Some believed that the substance-inflected procedural systems of the past had inhibited the evolution of the substantive law,[73] a problem uniform rules not beholden to any substantive context would solve.

The growing complexity of the federal regulatory state in the 1930s deserves direct credit for the emergence of trans-substantivity as a central organizational principle for administrative law. Chaotic bureaucratic growth convinced everyone from Franklin Roosevelt to his political adversaries that administrative governance required some kind of standardization.[74] Roosevelt's suggestion, a reorganization of agencies under a single chain of command leading

71. Marcus, *Trans-Substantivity*, *supra* note 11, at 397–98; *see also* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 324 (2008).

72. *E.g.*, Lawrence Baum et al., *The Evolution of Litigation in the Federal Courts of Appeals, 1895–1975*, 16 LAW & SOC. REV. 291, 301 (1981); Wolf Hydebrand, *Government Litigation and National Policymaking*, 24 LAW & SOC. REV. 477, 482–83 (1990).

73. *E.g.*, Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 300 (1938) (fearing that the "undue rigidity" of prior procedural regimes would interfere with "a developing substantive law"); *see also* Subrin, *How Equity Conquered Common Law*, *supra* note 70, at 973–74; Stephen N. Subrin, *The Limitations on Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENVER U. L. REV. 377, 386 (2010). *Cf.* Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73, 78–86 (2008); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246 (1989) ("Formulation of new theories of legal rights is simpler, virtually by definition, under a pleading system that is not constructed in terms of old legal categories, as was code pleading and common law pleading.").

74. *Compare Report of the Special Committee on Administrative Law*, 62 ANN. REP. A.B.A. 789, 795 (1937) [hereinafter 1937 A.B.A. Report] (lamenting "the absence of any order or system in the organization and functioning of the several departments, independent establishments, boards, commissions, government-owned corporations, and other agencies"), *and Report of the Special Committee on Administrative Law*, 56 ANN. REP. A.B.A. 407, 415 (1933), *with Reorganization of the Executive Departments: Message from the President of the United States Transmitting a Report on Reorganization of the Executive Departments of the Government*, 75th Cong., 1st Sess., Jan. 12, 1937, at 2 (complaining that "[t]here are over 100 separate departments, boards, commissions, corporations, authorities, agencies, and activities through which the work of the Government is being carried on," and insisting that "[n]either the President nor the Congress can exercise effective supervision and direction over such a chaos of establishments") [hereinafter "Reorganization Message"].

directly to him,[75] left conservatives apoplectic.[76] To simplify the story, conservatives responded with draft legislation, dubbed the Walter-Logan Bill, that proposed a uniform set of highly cumbersome procedural requirements on all New Deal agency activities.[77] FDR vetoed it in December 1940. He perceived the effort as an attempt to enchain the New Deal in procedural shackles, a reaction justified by the fact that the bill exempted most agencies that antedated the New Deal from its coverage.[78] Roosevelt may not have had a problem with trans-substantivity for administrative governance *per se*, just the rigid requirements the Walter-Logan Bill contemplated. Identifying a connection between procedural and administrative reform that others would recognize later, Roosevelt compared the Walter-Logan Bill disfavorably with the trans-substantive FRCP, one of the "most significant and useful trends of the twentieth century in legal administration."[79]

75. Reorganization Message, *supra* note 74, at 3. *See generally* Christopher S. Yoo, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 93–106 (2004).

76. *Dictatorship Plan Charged*, L.A. TIMES, Jan. 31, 1938, at 5 (quoting Sen. Pinchot) (describing Roosevelt's plan as an attempt to "transform[] the government into a dictatorship"); *House Votes Veto Power Into Reorganization Bill*, ATLANTA CONST., Apr. 8, 1938, at 1, 7 (quoting a House opponent to the plan, who called it "'an escalator to a dictatorship'"); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1585 (1996).

77. 1937 A.B.A. Report, *supra* note 74, at 814; Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 271–73 (1978).

78. Verkuil, *supra* note 75, at 273 (explaining the anti-New Deal motivations of supporters of the Walter-Logan bill); Shepherd, *supra* note 76, at 1580; James Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077, 1102 (1940); *see also* Letter from Robert H. Jackson, Attorney General, Office of the Attorney General, to the President, Dec. 11, 1940, 86 Cong. Rec. 13943, 13944 (Dec. 18, 1940) (arguing that uniformity in the regulation of public administration "was as if we should average the sizes of all men's feet and then buy shoes of only that one size for the Army"). Trans-substantivity in administrative procedure retained this partisan valence in the famed 1941 Report of the Attorney General's Committee on Administrative Procedure. On the political leanings and background of committee members, see Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 388 (2008).

79. Message from the President to the U.S. House of Representatives, Dec. 18, 1940, 86 Cong. Rec. 13942, 13942. *See also* Robert H. Jackson, *The Problem of the Administrative Process*, 29 WIS. ST. BAR ASS'N REP. 155 (1939) (contrasting "court procedure" with the administrative process).

B. Trans-Substantivity's Entrenchment

Trans-substantivity grew entrenched for procedural and administrative doctrine after the war. As Henry Hart and Herbert Wechsler observed in 1953, "uniformity as a general principle has . . . won the day throughout the field of federal procedure."[80] The creeping substance-specificity that had plagued the Field Code did not similarly distort the FRCP regime. During the 1940s and 1950s, a modest threat came from complex antitrust cases. Some district judges believed that this litigation suffered from particular dysfunctions, and that procedural rules tailor-made for antitrust claims could respond.[81] But the courts of appeals quelled the rebellion.[82] The Federal Rules "adopted a uniform system for all cases," Charles Clark wrote for the Second Circuit in 1957.[83] As he elaborated off the bench, "[i]t is neither right nor dignified for [judges] to erode what the Congress has granted," by erecting procedural barriers that would interfere with the realization of the policy objectives of the antitrust laws.[84]

After World War II interrupted progress on the reform of administrative governance, Congress, by a unanimous vote, passed the trans-substantive APA in 1946.[85] The APA created some

80. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 589 (1953).

81. New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp., 16 F.R.D. 203, 206 (S.D.N.Y. 1954); *see also* Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 50 n.8 (1957) (citing similar cases). On the dysfunctions, see Archie O. Dawson, *The Place of the Pleading in a Proper Definition of the Issues in the "Big Case"*, 23 F.R.D. 430, 431 (1958).

82. Nagler v. Admiral Corp., 248 F.2d 319, 323 (2d Cir. 1957); Package Closure Corp. v. Sealright Co., 141 F.2d 972, 978 (2d Cir. 1944); La. Farmers' Protective Union, Inc. v. Great Atlantic & Pac. Tea Co. of America, Inc., 131 F.2d 419 (8th Cir. 1942); *see also* United States v. Standard Oil Co. of Cal., 7 F.R.D. 338, 340 (S.D. Cal. 1947).

83. *Nagler*, 248 F.2d at 323.

84. Charles E. Clark, *Comment on Judge Dawson's Paper on the Place of the Pleading in a Proper Definition of the Issues in the "Big Case"*, 23 F.R.D. 435, 439 (1958); *see also* Clark, *Special Pleading*, *supra* note 81, at 50 (insisting that "it is not for us to fight Congressional policy" with particularized procedure).

85. The political meaning of the APA's enactment is contested, and its unanimous enactment may not reflect a bipartisan embrace of trans-substantivity in administrative law. For contrasting interpretations of the politics of the APA's enactment, compare James E. Brazier, *An Anti-New Dealer Legacy: The Administrative Procedure Act*, 8 J. POL'Y HIST. 206 (1996), with McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 189–95 (1999). Contemporaries seemed to think that the idea of uniformity had won broad acceptance by the time of the APA's passage. *See* Bernard Schwartz, *Administrative Justice and its Place in the Legal Order*, 30 N.Y.U. L. REV. 1390, 1391 (1955).

innovations for administrative law but mostly codified a set of best practices that agencies had developed for themselves.[86] It imposed only "minimal procedural essentials," in the words of one of its chief sponsors,[87] and hardly the burdensome requirements that the Walter-Logan Bill contemplated.[88]

Still, the APA and the trans-substantive regime it created were significant. For one thing, contemporaries understood the APA's trans-substantivity to prioritize a value of what I call "generality." This value stands for the notion that legal processes should not target particular entities or persons for idiosyncratic treatment. In a number of instances after the APA's enactment, Congress legislated particular requirements for specific agencies.[89] Opponents of this specialized treatment invoked the APA's trans-substantivity, as modeling a generality value, to support their resistance.[90] These opponents argued that the APA was supposed to ensure that all agency processes remain yoked to general rules articulated in advance, to keep government officials from ruling by fiat, and to

86. JOANNA GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 77–82 (2012).

87. Verkuil, *supra* note 77, at 277 n. 101 (quoting Sen. Pat McCarran).

88. GRISINGER, *supra* note 86, at 77–82.

89. *E.g.*, Administrative Conference of the United States, Committee on Judicial Review, *Special Statutory Provisions Governing Judicial Review of Federal Administrative Proceedings*, Part I – Executive Departments (Aug. 1962); S. Rep. No. 83-111 (1953) (describing various statutes exempting particular agency processes from the APA). *E.g.*, Marcello v. Bonds, 349 U.S. 302, 305–10 (1955) (describing Congress's response to a decision subjecting immigration adjudication to the APA).

90. *E.g.*, *Report of the Committee on Improvement of Administrative Procedure*, 12 ADMIN. L. BULL. 254, 254 (1960); *President's Conference on Administrative Procedure*, 14 FED. COMM. B.J. 15, 15 (1955); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 23, 32, 40–41 (Mar. 1955) (Hoover Commission Report) (counseling against exemptions from the APA and arguing in favor of uniform rules for administrative procedure); Alexander Wiley, *Administrative Law: Further Improvements in Agency Procedure*, 34 A.B.A. J. 877, 879–80 (1948) (argument by Chairman of U.S Senate Committee on the Judiciary in favor of uniform rules of agency procedure modeled on the Federal Rules); *Aitchison on Uniform Rules*, 1 ADMIN. L. BULL. 41 (1949); Pat McCarran, *Total Justice and Administrative Procedure*, 1 ADMIN. L. BULL. 15, 21 (1949); Arthur T. Vanderbilt, *Administrative Procedure: Shall Rules Before Agencies Be Uniform?*, 34 A.B.A. J. 896 (1948). For doubts about the wisdom of generality in administrative law, see, 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 8.02, at 515–20 (1958); George T. Washington, *Are Uniform Rules of Procedure Practicable?*, 34 A.B.A. J. 1011 (1948); Committee on Administrative Law, *Report on the Question of Uniform Rules of Administrative Practice and Procedure, With Specific Reference to the McCarran Bill, S. 527 of the 81st Congress*, 4 REC. ASS'N B. CITY N.Y. 244, 244 (1949).

depoliticize the governance of public administration.[91] This concern for generality motivated several nearly successful efforts to create a rulemaking process for administrative procedure modeled on the rulemaking process for the FRCP, one that would have strengthened the trans-substantive character of administrative law even further.[92]

Trans-substantivity exerted significant influence on the post-war evolution of administrative law in the courts, in ways that underscored the identification of trans-substantivity with this value of generality.[93] *Wong Yang Sung v. McGrath*,[94] which the Supreme Court decided in 1950, is the best example. The Court invoked the APA's "purpose" of "greater uniformity of procedure and standardization of administrative practice" to justify a presumption that the APA governed an agency's processes absent a clear statement from Congress otherwise.[95] The *Wong Yang Sung* court held that the APA's separation-of-functions requirement applied to deportation proceedings, such that immigration officials responsible for initiating these proceedings could not also adjudicate them.[96] The Court denounced how the agency had conflated these roles. In so doing, it identified generality in administrative governance with protection against governmental action targeting a politically vulnerable group.[97] The Court quickly extended this preference for generality to other administrative contexts.[98]

---

91. GRISINGER, *supra* note 86, at 108.

92. Kenneth Culp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. PA. L. REV. 1057, 1069 (1961) (commenting on the Eisenhower Administration's establishment of an Office of Administrative Procedure, created in part to recommend uniform procedural rules when possible); S. Rep. No. 83-1953, at 2–3 (1954); *Uniform Rules*, 7 ADMIN. L. BULL. 28, 32 (1954) (noting bill's passage by the Senate); S. Rep. No. 82-403 (1951); *Activities of Sections and Committees*, 37 A.B.A. J. 699, 699 (1951) (noting the bill's passage by the Senate). Pat McCarran had proposed similar legislation in 1949. *McCarran Bill for Uniform Rules*, 1 ADMIN. L. BULL. 23 (1949). Others would propose similar legislation in 1960. *Report of the Committee on Improvement of Administrative Procedure*, 12 ADMIN. L. BULL. 254, 254 (1960). On the motives for this legislation, see GRISINGER, *supra* note 86, at 215.

93. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951); United States v. Smith, 87 F. Supp. 293, 294 (D. Conn. 1949). *Cf.* Heikkila v. Barber, 345 U.S. 229, 238 (1953) (Frankfurter, J., dissenting).

94. 339 U.S. 33 (1950).

95. *Id.* at 41.

96. *Id.* at 44–45.

97. *Id.* at 46.

98. *E.g.*, Riss & Co. v. United States, 341 U.S. 907 (1951) (per curiam) (reversing a decision holding that the APA applied to certain proceedings within the Interstate Commerce Commission); Cates v. Haderlein, 342 U.S. 804 (per curiam) (1951) (reversing a decision

Several factors may have contributed to trans-substantivity's post-war entrenchment in both species of doctrine. The first is straightforward. The increased complexity of American law may have required a set of trans-substantive defaults for the regulation of litigation and public administration. During the 1930s and afterward, lawmakers simply could not fashion substance-specific process law fast enough. Second, trans-substantivity, which had no partisan valence for New Deal-era procedure, shed some of its ideological freight by 1950 or so for administrative law. Generality as a commitment in administrative governance probably began to appeal more to New Dealers by the late 1940s. Their grip on the levers of the federal bureaucracy weakened, and they could count on having less direct legislative control over agency processes going forward.[99] It makes sense that New Dealers would want some baseline procedural constraint on agencies once they lost control of the agencies themselves.

Third, trans-substantivity as a design principle neatly reflected a more basic commitment steering the evolution of administrative law and civil procedure during and after the war. Lawmakers trying to reform process law can abide by a trans-substantivity norm if they believe that that court-based litigation or public administration can improve without explicit reference to the particular substantive results that these processes generate. This faith in process lurked as an unstated premise of post-New Deal administrative law. Doctrine of this era permitted courts to regulate administrative procedure, but it did not authorize them to meddle with the substance of agency decision-making.[100] One of the FRCP's chief normative

denying that the APA applied to certain proceedings conducted by the Postmaster General). *See generally* William Funk, *The Rise and Purported Demise of* Wong Yang Sung, 58 ADMIN. L. REV. 881, 885–88 (2006).

99. McNollgast, *supra* note 85, at 189–95.

100. For a representative case, where the Court denies that it can question the substance of the agency's decision, but where it nonetheless remands with instructions to the agency that it compile a better record, see, for example, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941); *see also* Scripps-Howard Radio v. FCC, 316 U.S. 4, 9–10 (1942) (denying judicial power to question the substantive wisdom of agency policymaking, but insisting that courts retain the power to stay the enforcement of an order pending appeal); *see generally* Estep v. United States, 327 U.S. 114, 132 (1946) (Murphy, J., concurring); Reuel Schiller, *"St. George and the Dragon": Courts and the Development of the Administrative State in Twentieth Century America*, 17 J. POL'Y HIST. 110, 118 (2005); Louis L. Jaffe, *Judicial Review of Procedural Decisions and the* Philco *Cases: Plus ÇA Change?*, 50 GEO. L.J. 661, 663 (1962); Bernard Schwartz, *A Decade of Administrative Law: 1942–1951*, 51 MICH. L. REV. 775, 862 (1953).

commitments was similar: judges can regulate procedure to improve litigation, but they should not let procedural rules disrupt the operation of the substantive law.[101]

Finally, legal process jurisprudence, which dominated American legal thought after the war, created a fertile intellectual environment for trans-substantivity's entrenchment. The principle offered a shorthand of sorts for process theory's particular emphasis on institutional competence and procedural quality.[102] Insofar as the principle conveyed the idea that judges could meaningfully supervise agency processes without control over the substance of public administration, trans-substantivity mirrored the legal process preference.[103] Courts are ill-equipped to question agencies' regulatory choices, some process theorists believed.[104] But administrative legitimacy depends upon the quality of agency decision-making processes, something judicial oversight could ensure.[105]

In litigation, ad hoc, consequentialist decision-making of the sort that might generate a particular procedural rule for antitrust litigation undermined adjudicative legitimacy.[106] As Lon Fuller explained in a passage reproduced in *The Legal Process* materials, "[a]djudication can be effective only when it is attended by that minimum, formal rationality which demands a like treatment of like cases. But the like treatment of like cases presupposes some general principle or standard by which 'like cases' and 'like treatment' can be

101. *E.g.*, Nagler v. Admiral Corp., 248 F.2d 319, 326 (2d Cir. 1957); *see also id.* at 323.

102. *E.g.*, Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 962 (1994) (describing institutional competence focus); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li, xciv (1994).

103. *See generally* Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 579 (1992) ("[T]he passage from the New Deal revolution to the legal process counterrevolution is marked by the preoccupation in the late 1930s and 1940s with regularizing agency decision making procedures.").

104. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 400 (1978). *See also* HART & SACKS, *supra* note 102, at 399–400 (excerpting Fuller's article and quoting his insistence that "adjudication cannot be used to decide . . . questions . . . that may be said generally to have a 'managerial' quality").

105. *See* Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1129–30 (1954).

106. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

defined."[107] Trans-substantive procedural rules could ensure that "principles of decision applicable not only to the case in hand but to other like cases" drove judicial decision-making.[108] The quality of the litigation process, not particular substantive results, should matter to the application of procedural doctrine.[109]

This history provides two final lessons. The first is obvious, made all the more so by the examples of substance-specificity in process law that appear throughout this Article. Trans-substantivity is not in the very nature of procedural and administrative doctrine. Its entrenchment resulted from an evolutionary process punctuated in significant measure by the New Deal and its aftermath. Second, reflecting legal process jurisprudence that the principle mirrored so well after the war,[110] trans-substantivity has to do with the proper allocation of decision-making power among government institutions based on their respective competencies. This premise provides the foundation for my justification of trans-substantivity as a principle of doctrinal design.

III. A JUSTIFICATION FOR TRANS-SUBSTANTIVITY IN PROCESS LAW

Plenty of process law is not trans-substantive. Specialized requirements govern rulemaking by the U.S. Treasury,[111] plaintiffs in medical malpractice cases often must meet particularized procedural requirements,[112] and immigrants litigating their status under the INA may benefit from an interpretive presumption in their favor.[113] State and federal systems direct entire categories of litigation, such as bankruptcy, probate, and family law, into substance-specific silos for processing. For decades, commentators have cited this sort of particularized doctrine to question whether

107. Fuller, quoted in HART & SACKS, *supra* note 102, at 399; *see also* Kent Greenawalt, *The Enduring Significance of the Neutral Principles*, 78 COLUM. L. REV. 982, 985–89 (1978) (elaborating on the neutral principles idea).

108. HART & SACKS, *supra* note 102, at 642.

109. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512–13 (1954).

110. For a summary of central tenets of legal process theory, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 233 (1995).

111. *E.g.*, Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1735–40 (2007).

112. *See* Marcus, *Trans-Substantivity*, *supra* note 11, at 407–10.

113. *E.g.*, Navarro v. Mukasey, 518 F.3d 729, 736 (9th Cir. 2008).

trans-substantivity remains a central principle of doctrinal design for process law.[114]

Yet significant swaths of process law remain trans-substantive.[115] Some of it is unambiguously so. Other doctrine is nominally trans-substantive, while lending itself to regularized patterns of substance-specific application. Even for this latter category, decision-makers invoke trans-substantivity with some frequency to keep doctrine from sliding toward the substance-specific end of the spectrum. The principle's considerable, if not overwhelming,[116] force as a constraint on procedural doctrine is

114. *E.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 90–94 (2010); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 600 (2005); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 526 (1986); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2048–51 (1989); Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011); Note, *Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*, 119 HARV. L. REV. 2530, 2533–35 (2006); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988).

115. A datum often invoked as a sign of disappearing trans-substantivity in civil procedure is Congress's decision to legislate specific procedures for prison litigation. *E.g.*, JUDITH RESNIK & NANCY S. MARDER, SUGGESTIONS FOR AND REFLECTIONS ON TEACHING ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 2 (2004) ("The trans-substantive premise of the civil rules has been rejected through amendments made by the judiciary and by CongressFalse. Today, national legislation, local rulemaking, and private contracting impose different litigating requirements for certain kinds of disputes, [including] litigation about prison conditions."); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1562–63 (2003). While this legislation did indeed create particularized procedures for some stages of a prison lawsuit, it left a host of issues—the pleading standard, the legal threshold for a court's personal jurisdiction, and the nature of the inquiry at the summary judgment stage, to name a few—unchanged. For trans-substantive rules regulating prison litigation in the wake of the PLRA, see, for example, Jones v. Bock, 549 U.S. 199, 212 (2007) (pleading); Trujillo v. Williams, 465 F.3d 1210, 1217–22 (10th Cir. 2010) (personal jurisdiction); Murray v. Edwards Cnty. Sheriff's Dept., 453 F. Supp. 2d 1280, 1284–85 (D. Kan. 2006) (summary judgment). Another ostensible signal of disappearing trans-substantivity is the devolution of authority to ninety-four federal districts to craft local rules, *e.g.*, Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1504–05 (1992); RESNIK & MARDER, *supra* note 115, at 2. But evidence of extensive substance-specificity in local rules is not extensive, *e.g.*, Joshua M. Koppel, Comment, *Tailoring Discovery: Using Nontranssubstantive Rules To Reduce Waste and Abuse*, 161 U. PA. L. REV. 243, 266 (2012); Marcus, *Trans-Substantivity*, *supra* note 11, at 427–28.

116. Horne v. Flores, 557 U.S. 433, 450 (2009) (insisting that courts take a "flexible approach" to Rule 60(b)(5) motions addressing institutional reform decrees); Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After* Horne v. Flores, 46 U.C. DAVIS L. REV. ___ (forthcoming 2013) (draft at 42).

evident,[117] and "the importance of maintaining a uniform approach" likewise steers the evolution of administrative law.[118]

Unless the many departures from the trans-substantive norm are uniformly unwise, legal processes may sometimes proceed better if regulated by substance-specific rules. Does trans-substantivity enjoy any general justification, or does the choice between a particular trans-substantive rule and a substance-specific alternative depend on context-specific variables? The answer depends on the institution involved in the law's generation and maintenance. For court-made process doctrine, a general justification for trans-substantivity in doctrinal design exists. Courts suffer from institutional limitations that have to do with their legitimacy, competency, and effectiveness as lawmakers. Trans-substantivity ameliorates these deficits and thereby helps improve the process law courts create and administer.

A. The Costs and Benefits of Trans-Substantivity

Trans-substantivity serves several important values. Generality is one, as the history recounted in Part II suggests. The refusal to discriminate among different antecedent regimes means that regimes' beneficiaries get treated as objects of equal concern by the processes of American law. Adjudication, for example, proceeds pursuant to the same set of rules for individuals alleging routine tort claims as for corporations litigating huge commercial claims. As a guarantor of generality, trans-substantivity can protect process law against distortion otherwise produced by outsized political influence,

117. Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009); Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 904 (E.D. Pa. 2011). *Cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557–60 (2011) (rejecting a decades-old Title VII-specific application of Rule 23(b)(2)).

118. Mayo Found. for Medical Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) (internal quotations omitted); Dickinson v. Zurko, 527 U.S. 150, 162 (1999); Vill. of Barrington, Ill. v. Surface Transp. Bd., 636 F.3d 650, 659 (D.C. Cir. 2011) (rejecting a proposed exemption from *Chevron* deference for interpretations proffered by a particular agency); Cohen v. United States, 650 F.3d 717, 723 (D.C. Cir. 2011) (rejecting a tax-specific standard for the review of agency inaction); Dir. Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267, 280–81 (1994); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). For similar sentiments expressed in the interpretation of state versions of the Administrative Procedure Act, see, for example, Dept. of Educ. v. Kitchens, 387 S.E.2d 579, 580 (Ga. App. 1989); Rogue Flyfishers, Inc. v. Water Policy Review Bd., 62 Or. App. 412, 414 n.1 (1983); Trask v. Johnson, 452 P.2d 575, 578 (Ok. 1969). *See generally* In re Lovin, 652 F.3d 1349, 1353–54 (Fed. Cir. 2011); Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. 89, 93 (2010) (commenting on the rise and fall of a tax-specific deference standard).

capture, or bias. Also, trans-substantive doctrine can lower the barriers to entry for areas of practice. General rules mean fewer advantages for legal specialists. Trans-substantivity thus helps to enable generalist lawyers to practice in a wider array of contexts.

But trans-substantivity is not "sacred."[119] Sometimes equal treatment of legal processes involving different antecedent regimes makes little sense, especially when antecedent regimes involve particular policy problems that specially-tailored process law might address. In such instances, an unyielding commitment to trans-substantivity can impose costs. Sometimes substance-specific process law gives lawmakers a nuanced way to adjust the regulatory effect of a particular antecedent regime. Instead of ending or restricting liability for insurance companies under a consumer protection law, for example, a state might instead decide to limit their exposure to class action lawsuits.[120] If trans-substantivity required the class action rule to remain indifferent to substantive context, lawmakers could not use this procedural avenue to achieve the desired regulatory effect.

Substance-specific doctrines may also respond to dysfunctions from which legal processes involving particular antecedent regimes tend to suffer. If lawmakers cannot depart from the trans-substantive norm to address these dysfunctions, they must either let these dysfunctions fester, or they must remedy them with an over-inclusive trans-substantive response that applies unnecessarily to processes involving other antecedent regimes. The Supreme Court's recent forays into pleading doctrine are a good example. The Court first raised the federal pleading standard in an antitrust case,[121] a move with some logic behind it. In certain instances, firm behavior in competitive markets that smacks of conspiracy can just as likely result from innocent activity.[122] The new pleading standard ensures that antitrust plaintiffs cannot get to discovery, and thereby impose significant litigation costs on defendants, with allegations that do no more than describe legitimate self-interested conduct. But the commitment to trans-substantivity in federal pleading law is

119. Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L REV. 399, 409 n.56 (2011).

120. *Cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 444 (2010) (Ginsburg, J., dissenting) (discussing legislation in New York to this effect).

121. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556–57 (2007).

122. *Id.* at 554.

uncompromising.[123] The Court's decision to extend the heightened pleading standard to civil rights cases came as a foregone conclusion,[124] even though the particular rationale for heightened pleading in antitrust litigation does not obtain elsewhere.

This mix of costs and benefits would seem to preclude any generalized justification for trans-substantivity. Maybe a decision-maker contemplating a deviation from the trans-substantive norm for a particular problem of process law can only decide wisely if she undertakes a contextualized assessment of the principle's costs and benefits. Such an assessment would include an empirical measurement of results with the trans-substantive rule, a normative evaluation of those results, an empirical estimate of the likely outcomes with a substance-specific rule, and a determination of their normative significance.

B. The Judiciary and Process Law

This doubt, that a general justification for trans-substantivity exists, assumes that the decision-maker has the capacity to make a good contextualized assessment of the sort I just described. But courts do not. They suffer from a set of institutional limitations that can disable them from legitimately, competently, and effectively designing substance-specific process law to correct for dysfunctions, or to fine-tune the regulatory effect of a particular antecedent regime. Trans-substantivity, as a response to these deficits, thus enjoys a general justification for *judge-made* process law. Because courts fashion a lot of process law, this institutional justification supports the persistence of trans-substantivity as a central principle for doctrinal design.

1. Judicial Upkeep of Process Law

Congress creates a lot of administrative law, as statutes ranging from the trans-substantive (the APA, the Federal Register Act, and so on)[125] to the subject-specific (the Veterans Benefits Improvement

123. Burbank, *General Rules*, *supra* note 10, at 549.

124. Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

125. WILLIAM F. FUNK ET AL., FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, at vii–xv (4th ed. 2008) (listing statutes); Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemakings*, 27 FLA. ST. U. L. REV. 533, 536 (2000).

Act)[126] illustrate. The Rules Enabling Act of 1934, which established the institutional framework for procedural rulemaking, similarly reflects Congress's involvement in the creation of civil procedure doctrine. State legislatures have enacted a multitude of interpretive instructions.[127]

Nonetheless, courts or court-supervised actors generate a lot of process law. Statutes formally govern forum regulation for civil litigation, and the U.S. Constitution sets baselines for acceptable procedure. But the weight of procedural doctrine comes from court-supervised rulemakers or in judicial opinions.[128] Even the law of federal subject matter jurisdiction, which requires a statutory anchor, often in reality flows from a judicial tap.[129] As for interpretive doctrine, only recently have scholars begun to question the judiciary's primary role in its generation,[130] and even to treat positively-enacted interpretive instructions as worthy of study.[131]

---

126. 38 U.S.C. § 5121A(a)(1) (regulating the substitution of parties after a veteran's death); 42 U.S.C. § 7607(d)(3) (specifying particular requirements for EPA notice-and-comment rulemaking); 8 C.F.R. § 1003.12 *et seq.* (regulations crafted by the Executive Office of Immigration Review for the conduct of immigration hearings).

127. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) [hereinafter Gluck, *States as Labratories*].

128. On procedural doctrine in state systems, see John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1431 (1986); *see also* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003).

129. Until 1990, the law of supplemental jurisdiction was entirely judge-made, notwithstanding the general understanding that Congress had to act to create subject matter jurisdiction. *See* Wendy Collins Perdue, Finley v. United States*: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 546 (1990); Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 35–41 (1992). When the Supreme Court devised its test for when state law claims that depend in significant measure on a federal legal issue arise under federal law for the purposes of federal question jurisdiction, it did not bother interpreting the federal question jurisdiction statute to do so. *See generally* Grable & Sons Metal Prods., Inc. v. Darue Engineering, 545 U.S. 308 (2005).

130. *E.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2079, 2086 (2002) ("The central, unquestioned premise in [the] field [of statutory interpretation] is that the judiciary is the proper branch to design and implement tools of statutory interpretation."); *id.* at 2088–89 ("[S]tatutory interpretation was long assumed the exclusive province of the judiciary.").

131. *E.g.*, Scott, *supra* note 127, at 341; Gluck, *States as Laboratories*, supra note 127, at 1750; *cf.* William N. Eskridge, Jr., *Justice Scalia's Living Textualism and Our Normative Canons*, __ COLUM. L. REV. ___ (forthcoming 2013) (manuscript at 33–34) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (commenting on

The orthodox view is that administrative law lies predominantly in judge-made doctrine.[132] To be sure, various rules have a statutory "hook," but their content hardly comes from the text of a statute like the APA through a process one could defensibly describe as statutory interpretation.[133] Challenges to this perception of judicial dominance have surfaced,[134] and a web of positively-enacted instructions govern various administrative processes. Still, whatever becomes of the orthodox view, judges in fact continue to devise and superintend significant and core components of administrative law.[135]

Judicial responsibility for a lot of process law probably results from institutional limitations that interfere with lawmaking activity by coordinate branches. Often legislatures lack interest in procedural technicalities,[136] although the importance of process law to the effective implementation of antecedent regimes is hardly a mystery. This general awareness, that process law holds great power over the realization of policy objectives, makes all the more notable the

Scalia's lack of attention to legislated instructions).

132. *E.g.*, Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1296 (2012); Jack M. Beerman, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 2 (2011); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1999); Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 3–4. *See generally* MASHAW, *supra* note 63, at 289 (describing "[t]he twenty-first century model" of administrative law as one "whose sources are found almost exclusively in general principles derived from judicial review; from trans-substantive statutes that apply to most, if not all, agencies; and, to a much lesser extent, from judicial construction of the Constitution").

133. Metzger, *supra* note 132, at 1299. For an example, see United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251–52 (2d Cir. 1977); *see also* American Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanagh, J., concurring) (insisting that the *Nova Scotia* obligation, ostensibly derived from APA § 553, that agencies disclose the data they base their rules on "cannot be squared with the text of . . . the APA").

134. MASHAW, *supra* note 63, at 285–316; Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009); Mashaw, *Gilded Age*, *supra* note 67, at 1470.

135. *Cf.* Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J. L. ECON. & ORG. 267, 290 (1990) [hereinafter Mashaw, *Explaining Administrative Process*] ("It seems virtually undeniable that the major procedural developments in American administrative law . . . have been the work largely of the courts or of the Chief Executive.").

136. The hyper-technical Jurisdiction and Venue Clarification Act of 2011, for example, got stuck in a five-year holding pattern because, as the House Committee Report recounts, the House Judiciary Committee "did not have time" to focus on details of federal forum regulation. H.R. REP. No. 112-10, at 2 (2011); *see also* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1224–25 (1996) (commenting on legislative indifference to procedural reform in past years).

legislative tendency to delegate process law to courts. Legislatures routinely use a narrow range of devices, like fee-shifting provisions, to affect the legal process for a particular antecedent regime,[137] but they eschew many others. Congress, for example, hardly ever specifies whether or how a bill's legislative history can be used in interpretation.[138]

Legislative dynamics, in particular the gauntlet of vetogates a bill must run, might explain this phenomenon.[139] General statutes like the APA or CAFA that aim to transform significantly the governance of a legal process have encountered great resistance.[140] Congress can always include specialized instructions for a particular antecedent regime in the bill establishing or amending the regime itself, but doing so would significantly multiply the points of possible disagreement and thus the prospect of legislative sclerosis. A supporter of the bill might, for this reason, leave process details out.

Congress can also enact procedural, administrative, and interpretive rules after an antecedent regime's creation, as it did when it crafted the pleading threshold for securities litigation in 1995, or when it prescribed rulemaking requirements for the Federal Trade Commission in 1974.[141] These sorts of interventions are not common,[142] presumably for the reasons just mentioned. Moreover,

137. On the efficacy of fee-shifting provisions to amplify the regulatory force of an antecedent regime, see Sean Farhang & Douglas M. Spencer, *Economic Incentives For Attorney Representation in Civil Rights Litigation* (unpublished draft, Sept. 10, 2012).

138. The Civil Rights Act of 1991 instructs courts that they cannot consider anything other than a particular memorandum as legislative history usable in interpretation. Pub. L. No. 102-166, § 105(b), 105 Stat. 107 (1991). As far as I can tell, this limit is singular. Two sophisticated treatments of legislated instructions identify this one and none other. Linda D. Jellum, *"Which is to be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 852 (2009); Rosenkranz, *supra* note 130, at 2109–10. Congress's process law-interventions for litigation are mostly fee-shifting provisions. *See generally* Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 4–7 (2009) (discussing these devices); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 790–94 (2011) (discussing these devices).

139. *E.g.*, William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008). On relevant legislative dynamics generally, see generally Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 386–95.

140. On the APA's tortured history, see generally Shepherd, *supra* note 76. CAFA took eight years to get passed. *See* Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga is Finally Over*, 59 U. MIAMI L. REV. 385, 386–88 (2005).

141. Pub. L. No. 93-637, § 202(a), 88 Stat. 2183 (1974) (amending 15 U.S.C. §41).

142. *E.g.*, Mashaw, *Explaining Administrative Process*, *supra* note 135, at 280 ("Yet these detailed and process-specific incursions into administrative process seemed dwarfed by the degree to which the Congress acts generically and leaves the crucial details of procedural

the iterative dynamics of lawmaking might incentivize legislators to leave process alone as a general practice. Were a legislature regularly to enact ideologically-inflected process law, the practice might redound to complicate efforts to get antecedent regimes passed going forward. A sponsor offering an amendment to weaken a proposed statutory regime might have less credibility to a fence-sitter if the fence-sitter thought the sponsor would subsequently seek some specialized process rule to compensate for the amendment.

Congress has often delegated the authority to regulate aspects of their processes to agencies.[143] But agencies cannot legitimately control certain issues of administrative law, particularly those involving judicial review of agency action.[144] The specter of self-dealing would loom were agencies to promulgate rules to govern the judicial interpretation of statutes they administer,[145] or to supply procedural rules for cases they might litigate.[146]

Judicial responsibility for a lot of process law might also result from a protective sense of institutional prerogative. Process law's generation and maintenance may often end up in the courts by default. But even if legislators busied themselves with process law more often, or if agencies could legitimately promulgate more of this law, courts might resist such encroachments onto their territory. No procedural law fits more unambiguously in Congress's bailiwick than forum regulation. Even when Congress addresses a venue issue by statute, however, judges have continued to devise and use their own doctrine.[147] Abbe Gluck has documented judicial resistance to

implementation to agencies, courts, and perhaps the President.").

143. F.C.C. v. Pottsville Broad. Co., 309 U.S. 134, 143–44 (1940); Vt. Yankee Nuclear Power v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524–25 (1978).

144. *E.g.*, William S. Jordan, III, Chevron *and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 251 (2009) (arguing that courts should not extend *Chevron* deference to agency interpretations of the part of the APA instructing them when they must hold formal hearings).

145. Melissa M. Berry, *Beyond* Chevron*'s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 589–92 (2007).

146. *Cf.* Local Joint Exec. Bd. of Las Vegas v. NLRB, 657 F.3d 865, 872–73 (9th Cir. 2011) (refusing to allow the NLRB to use an agency-devised procedure to immunize a decision from review).

147. The best example is forum non conveniens. David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 1010–11 (2008); s*ee generally* Daniel J. Meltzer, *Jurisdiction and Discretion Reconsidered*, 79 NOTRE

legislative attempts to prescribe interpretive rules.[148] In *Vermont Yankee Nuclear Power Corp. v. NRDC*, the Supreme Court purportedly constrained the authority of the federal courts to develop a common law of administrative procedure.[149] But the federal courts continue to do so, *Vermont Yankee* notwithstanding.[150]

2. Trans-substantivity in judge-made process law

A justification for trans-substantivity as a principle of doctrinal design lurks in the fact that judges make a lot of process law. To some extent, the principle might reflect formal limits on courts' lawmaking authority. The Enabling Act prohibits rules that "abridge, enlarge, or modify any substantive right."[151] This constraint has not only steered rulemakers away from substance-specific proposals,[152] it also has generated a canon that counsels against substance-specificity in rule interpretation.[153] But this understanding of the Enabling Act's meaning is not necessarily correct.[154] Moreover, in other process law contexts, formal restrictions on substance-specificity are weaker or nonexistent. Interpretive doctrine rarely flows from a statutory source. The APA applies as a default unless Congress provides otherwise,[155] but the statute does not address a number of core issues in administrative law.[156]

DAME L. REV. 1891, 1893 (2004); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 545–61 (1985).

148. Gluck, *States as Laboratories*, *supra* note 127, at 1824–27; Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 758 (2013) ("But when it comes to statutory interpretation, federal judges seem particularly unwilling to relinquish—either to other federal courts, to state courts, or to legislatures—any power to dictate what rules of interpretation must be applied.").

149. 435 U.S. 519, 543 (1978); *see also* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 513–16 (2009); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653–56 (1990); Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 390.

150. Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 882–900 (2007); *see generally* Metzger, *supra* note 132, at 1331.

151. 28 U.S.C. § 2072(b).

152. Burbank, *General Rules*, *supra* note 10, at 542–43.

153. David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 968.

154. *E.g.*, Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1934–35 (1989) (questioning this understanding of the Enabling Act); Burbank, *General Rules*, *supra* note 10, at 542.

155. *E.g.*, Sierra Club v. Peterson, 228 F.3d 559, 565 (5th Cir. 2000).

156. These issues include the level of deference courts should afford agency interpretations

A more complete justification for trans-substantivity treats the principle as a response to various institutional limitations that should cabin judicial lawmaking within certain boundaries. To summarize, trans-substantivity operates as a "second-best."[157] It properly constrains doctrinal evolution where circumstances prevent lawmakers from making legitimate, competent, and effective choices for the design of process law. This is often the case when judges assume responsibility for the creation and maintenance of process law.

a. Lawmaking legitimacy. When courts craft substance-specific process law, they tend to do so to pursue policy objectives that they identify. Sometimes courts aim to boost or interfere with the regulatory force of the antecedent regime.[158] Examples include the favorable procedural treatment lower courts afforded Title VII claims in the 1970s, as I address below. Sometimes courts deviate from the trans-substantive norm to address problems of inefficiency, inadequate participation, and other dysfunctions from which a legal process for an antecedent regime may appear to suffer.[159] Adam Cox has suggested, for example, that Judge Posner withholds deference from Board of Immigration Appeals (BIA) interpretations of the Immigration and Nationality Act (INA) out of contempt for the BIA's competency.[160]

Process doctrines offer decision-makers ways to alter how a legal process realizes an antecedent regime's policy objectives. If another institution had crafted the antecedent regime in the first instance, a clash of lawmaking prerogative can result. Concerns about the legitimacy of judicial choices to mold the antecedent regime, and thereby consciously alter how it gets implemented, arise frequently.[161] Judges trespass on legislative terrain, so the argument

of statutes.

157. On the idea of the second-best, see, for example, Cass R. Sunstein & Adrian Vermeule, *Intepretation and Institutions*, 101 MICH. L. REV. 885, 914–15 (2003).

158. *See infra* notes 239–46 and accompanying text.

159. *See infra* notes 247–55 and accompanying text.

160. Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1683–84 (2007).

161. *E.g.*, Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 84–90 (1998) (discussing and criticizing civil rights-specific summary judgment doctrine); Kim, *supra* note 116, at 43–44. *Cf.* Cover, *supra*

goes, when they develop particularized processes to advance ends that they, not legislatures, select.[162] Critics complain that judges use subterfuge to boot, as they cloak what often amounts to a change to the antecedent regime in the guise of process law.[163] In some instances, this criticism might reflect a narrow understanding of legitimate judicial power. But some particularly aggressive deployments of process law must exceed the bounds of judicial authority.[164]

Trans-substantivity constrains a judge's policymaking flexibility and thus protects against encroachments on legislative terrain. It denies judges the authority to discriminate among substantive regimes and thus to make arguably political choices better left to coordinate branches.[165] Respect for a generality value may particularly buttress a court's institutional legitimacy.[166] If so, trans-substantivity as the value's manifestation in process law contributes. Subjected to trans-substantivity's constraints, a judge tempted to

note 11, at 731 ("[T]here is something problematic about manipulation of a procedural component to undermine the ostensible and articulated rule of law.").

162. Elliott v. Perez, 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring) ("We must solve judicial problems, and we must not solve legislative problems."); Cohen v. United States, 650 F.3d 717, 736 (D.C. Cir. 2011) (rejecting a proposed exemption of IRS action from judicial review, in part on grounds that "we are in no position to usurp [Congress's] choice" not to legislate such an exemption); Carl W. Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 357, 363–64 (1994); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 666 (2010).

163. *E.g.*, Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1091–92 (2008); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 84 (1994) (criticizing a Supreme Court decision interpreting the Bankruptcy Code that cloaked a policy-driven result in formalist gloss as "flunk[ing] any requirement of judicial candor"). One critic of the trans-substantive FRCP says that their vagueness, a necessary feature of a trans-substantive system, enables judges to cloak substantive policy preferences in individual case decision-making while employing nominally trans-substantive rules. Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474–75 (1987). *But see* Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776–79 (1993) (arguing against this indictment of the FRCP). This may be so, but, for my purposes, it is beside the point. Doctrine still gets designed, whether it is vacuous or not, and pressure on process law to splinter into substance-specific strains is real, whether courts need the law-in-books substance-specificity in order to achieve the law-in-action substance-specificity.

164. *E.g.*, Eskridge, *Law as Equilibrium*, *supra* note 163, at 83–84 (discussing an example of a case where the Court overstepped proper interpretive bounds).

165. Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2076 (1989).

166. *E.g.*, Greenawalt, *supra* note 107, at 1013; Fuller, *supra* note 104, at 366–67.

affect the antecedent regime through process law has a choice. She can change the process rule trans-substantively, and thus cause all sorts of unanticipated and unintended results for substantive areas that do not concern her. Alternatively, she can leave the status quo in place and let another institution, most likely the legislature, address the issue with a substance-specific rule.

b. Competency. If trans-substantivity discourages policymaking through process law, whatever legitimacy the principle purchases may come at a cost, as I suggested earlier. A particular antecedent regime may indeed work better if particularized rules sensitive to the regime's peculiar needs regulate the legal process involving it. This cost weakens the case for trans-substantivity, however, only if the decision-maker contemplating the substance-specific departure can reliably identify such regimes and craft process rules that in fact address the regimes' dysfunctions.

As a general matter, judges may not be particularly competent to make these determinations. To craft the right substance-specific rule, a court must address two questions: Is the specific problem that the court observes unique or systemic, and will a substance-specific rule ameliorate it? To answer these queries properly, a court should have data, expertise with their analysis, and metrics to evaluate outcomes under the trans-substantive rule and the substance-specific alternative. Inquiries of this sort differ considerably from the standard types of deliberation in which courts engage.[167] Even if judges could competently undertake data-driven analyses of aggregate-level policy needs, the problem of bias remains. Judges have not demonstrated any more capacity for dispassionate judgment than any of us has.[168] Prejudice could interfere with impartial assessments not only of which antecedent regimes operate sub-optimally, but also of whether substance-specific process law could help these regimes perform better.[169]

167. *E.g.*, Benjamin & Rai, *supra* note 12, at 309–10.

168. Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 891–92 (2012); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 31 (2007).

169. For suggestions that bias might steer judges in substance-specific directions, see generally Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 (1991); Charles S. Ralston, *Court v. Congress: Judicial Interpretation of the Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205 (1990);

Surely other decision-makers suffer from bias and maladroit empiricism. But three features of the institutional structure within which courts make decisions exacerbate the potential of these deficits to distort process law.[170] First, litigation compares poorly with other lawmaking processes in terms of the opportunities it offers for broad public participation. Parties have robust participatory rights, but restrictions otherwise limit nonparties' abilities to bring information to the court that might inform the contemplated substance-specific departure.[171] Judges rarely invite the public to weigh in on possible decisions, as agencies do in informal rulemaking. This comparative deficit makes a second feature, the often-asymmetric stakes of the parties to a case, all the more problematic. If one party is a repeat player, it will have an incentive to bring to the court's attention information about the systemic effects of a process doctrine that is helpful to its long-term interest. The other party, if a one-time litigant, may lack the sophistication or incentive to make the countervailing argument, informed by different information. Third, a single decision-maker, or at best a small panel of decision-makers, makes judge-made process law, whereas many lawmakers, with conflicting biases, participate in agency and legislative lawmaking.

Trans-substantivity protects against inexpert, biased decision-making in the same way it safeguards lawmaking legitimacy, by requiring respect for a generality value and thereby preventing distinctions among antecedent regimes. A judge may think that, because the EEOC has performed poorly, its interpretation of antidiscrimination statutes should not receive the same deference that other agency interpretations do.[172] But if the judge cannot craft an EEOC-tailored deference rule, he will have two options. He will have to apply the usual level of deference, or he will have to craft a less deferential norm for all agency interpretations. Either way, the

Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 300–01 (1989); Rotolo v. Borough of Charleroi, 532 F.2d 920, 925–27 (3d Cir. 1976) (Gibbons, J., concurring & dissenting).

170. For commentary similar to what I offer in this paragraph, see generally Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 577–78 (2002).

171. *E.g.*, FED. R. CIV. P. 24 (limiting intervention as of right in civil litigation).

172. *Cf.* Colker, *supra* note 169, at 160 (suggesting why courts do not want to defer to EEOC interpretations).

EEOC gets equal treatment. Given given barriers to an across-the-board decrease in deference, the judge will more likely leave the status quo in place.

c. Coordination. When judges self-consciously set out to craft substance-specific process law, they presumably do so not because they want to advantage a specific litigant. Rather, judges believe a substance-specific rule will produce better results across-the-board, or improve the performance of institutions involved in legal processes. A judge who refuses to extend *Chevron* deference to the BIA presumably does so not to advantage a particular immigrant, but because she thinks the agency is malfunctioning. The structure of the federal judiciary gives reason to doubt the efficacy of this sort of intervention, essentially an invitation to the BIA to get its act together.[173] The individual judge's prodding will probably achieve little unless it is part of a coordinated message to the agency. But rarely does anything formal coordinate decision-making from one judge to the next in the federal judiciary.[174]

Two types of coordination problems plague the creation of process law in the judiciary. First, the institutional structure of judiciaries may complicate efforts to devise a single approach for a particular process law problem. Appellate review, the most obvious coordinating device,[175] does not work particularly well to steer the elaboration of judge-made process law in some unified way. Several prominent attempts to craft higher pleading standards for civil rights claims, for example, left a mess in their wake. The effort spawned intra-circuit incoherence,[176] to add to garden-variety circuit splits.[177]

173. Cox, *supra* note 160, at 1683–84.

174. Adrian Vermeule, *The Judiciary Is A They, Not An It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 556–63 (2005); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105–16 (1987).

175. EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 333 (2008).

176. In 1986, for example, the Ninth Circuit refused to "require alleged constitutional violations to be pleaded with greater particularity than in other civil cases." Bergquist v. Cochise Cnty., 806 F.2d 1364, 1367 (9th Cir. 1986). In 1991, it expressly "adopt[ed] a heightened pleading standard in cases in which subjective intent is an element of a constitutional tort action[,]" with no cite to or discussion of its earlier decision. Branch v. Tunnell, 937 F.2d 1382, 1386 (9th Cir. 1991). For another example of intra-circuit inconsistency, see Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 899 (D. Mass. 1991) (Keeton, J.) (commenting on the First Circuit's "mixed signals" with respect to pleading requirements in Federal Tort Claims Act suits).

Obvious difficulties, like divisions among circuits, explain why appellate courts do not solve the problem of coordinated policymaking.[178] Features of procedural and interpretive doctrine exacerbate the problem. Federal case law on statutory interpretation lacks stare decisis effect.[179] The interlocutory status of many procedural decisions and the fact of settlement as the dominant endgame for civil litigation make opportunities for appellate procedural lawmaking infrequent. A Supreme Court decision on process law can exert considerable coordinating force. But the Court's extremely modest capacity sharply limits its ability to police doctrinal evolution.[180] Trans-substantivity responds to this coordination difficulty in a simple way. It limits the types of variations in process law, thereby reducing the policy strains needing coordination.

Even if an authoritative decision-maker could craft a substance-specific departure and ensure a coordinated response to a particular problem of process law, a second difficulty, having to do with spillover effects, emerges. Perhaps the Supreme Court wants to punish the BIA for substandard decision-making by withholding *Chevron* deference. The Court's decision would solve the coordination problem, since lower courts would necessarily follow its lead. If the Court were to depart in this manner, however, it would invite lower federal courts to do the same for other agencies that lower courts believe are similarly dysfunctional. Cacophony in administrative law could result.[181]

---

177. *See* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 583–90 (2002) (describing complicated circuit splits after *Leatherman*); Raines v. Starkville, 986 F.2d 1418, 1993 WL 58707, at *5 n.7 (5th Cir. 1993) (noting circuit split pre-*Leatherman*); Karen M. Blum, *Heightened Pleading: Is There Life After* Leatherman*?*, 44 CATH. U. L. REV. 59, 76–77 (1994) (same). For inter-circuit disagreement in another substance-specific pleading context, compare Mills v. Polar Molecular Corp., 12 F.3d 1170, 1176 (2d Cir. 1993) (requiring a securities fraud plaintiff to plead "facts that raise a strong inference of fraudulent intent"), with In re GlenFed, Inc. Securities Litigation, 42 F.3d 1541, 1549 (9th Cir. 1994) (permitting a securities fraud plaintiff to plead scienter generally).

178. Vermeule, *supra* note 174, at 561–63.

179. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1908 (2011); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1872–84 (2008).

180. *See generally* Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 426–31 (2012); Strauss, *supra* note 174, at 1117.

181. Dickinson v. Zurko, 527 U.S. 150, 162 (1999) (refusing to permit an IRS-specific administrative law norm, on grounds that doing so would "too readily permit[]" exceptions from

C. Process Law Made by Other Institutions

The foregoing argument for trans-substantivity works only for judge-made process law. Trans-substantivity has no general justification that should limit the legislative prerogative to enact substance-specific process law. The wisdom of these departures can only be evaluated individually, with particularized inquiries into the needs of legal processes involving specific antecedent regimes. Although some scholars have argued that legislatures trespass onto inherently judicial terrain when they manipulate process law,[182] the position is a minority one,[183] and legislatures likely enjoy broad powers to legislate process law as they see fit. Put differently, the process law that legislatures craft, trans-substantive or not, is every bit as legitimate as any other statute they pass.[184] Their competence to forge good-quality doctrine may be lacking. But there is nothing peculiar about process law that uniquely limits the range of legitimate legislative choice. Statutes also have the robust coordinating power that a single judicial opinion lacks.

Trans-substantivity continues to influence procedural doctrine fashioned in rulemaking processes,[185] and rightly so. Rulemakers, such as those on the Federal Civil Rules Advisory Committee, might not suffer from deficits of competency and coordination to the extent

---

the norm for other agencies). For a suggestion from the Court that this sort of logic has influenced the trans-substantive design of criminal procedure doctrine, see Mincey v. Arizona, 437 U.S. 385 (1978).

182. Jellum, *supra* note 138, at 879–97 (making a version of this argument for interpretive doctrine); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1297–98 (1993) (making the argument for procedural doctrine).

183. *E.g.*, Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1683–84 (2004) (responding to Mullenix's argument); Rosenkranz, *supra* note 127, at 2140 (arguing that interpretive statutes in the main are probably constitutional).

184. Another way to say this is to argue that generality as a value commands less deference for legislation, which can more legitimately discriminate based upon political considerations. Fuller, *supra* note 104, at 366–67.

185. *E.g.*, Rule 23, October 1997, *in* Advisory Committee on Civil Rules, Oct. 6–7, 1997, Agenda Materials, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv10-97.htm (explaining that the Advisory Committee abandoned a mass tort class action proposal for fear of Enabling Act problems); Minutes, Federal Civil Rules Advisory Committee Meeting, Feb. 16–17, 1995, *in* 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, 206 (1997) ("A specific mass torts rule may seem so laden with substantive overtones as to raise legitimate doubts about the wisdom of invoking regular rulemaking procedures.").

that individual judges devising doctrine do.[186] But the authority of these committees to act as lawmakers remains in question decades after their establishment.[187] Were rulemakers to discriminate among antecedent regimes for particularized procedural treatment, they would put at risk the modicum of political neutrality that trans-substantivity otherwise offers.[188] Procedural rulemaking cannot proceed entirely apart from politics, but there are degrees of politics in the exercise. Those instances when rulemakers have proposed specialized treatment for particular categories of litigation have provoked particular resistance.[189]

The sort of court I have had in mind up to this point is a federal court. The trans-substantive justification for process law made by common law courts differs. State judges face fewer legitimacy obstacles to the creation of substance-specific process law, particularly for common law claims that these judges create and maintain in the first instance.[190] If state appellate courts can meaningfully police the huge number of decisions that their lower court colleagues render, well in excess of what federal district judges handle,[191] the coordination problem might recede as well. The number of decision-makers needing coordination is lower,[192] and many states have practices, such as a presumption against published opinions, that decrease the total number of precedential decisions that need to be harmonized.[193] To the extent that state process law

186. Marcus, *Institutions*, *supra* note 153, at 944–46.

187. Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 29 (1996). *Cf.* Burbank, *General Rules*, *supra* note 10, at 549 (discussing this issue).

188. Burbank, *General Rules*, supra note 10, at 542–43. In addition, were a rulemaking committee to opt for substance-specific rules, it would have to make dozens of specific rules for one issue instead of a generic one, and it would magnify the potential for institutional gridlock fueled by normative disputes over translation problems that particular substantive regimes ostensibly cause.

189. The maturity requirement the Federal Civil Rules Advisory Committee proposed in the 1990s for mass tort class actions is one example. *E.g.*, David Marcus, *The Creation and Renewal of the Class Action System, 1953–1999*, at 101–04 (April 1, 2012) (unpublished manuscript) (on file with author).

190. Burbank, *Complexity*, *supra* note 163, at 1475.

191. *E.g.*, Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep"*, 45 CASE W. RES. L. REV. 705, 715–17 (1995).

192. For example, about 100 judges staff the California Courts of Appeal, well below the 180 or so federal appellate judges.

193. *E.g.*, CALIFORNIA SUPREME COURT ADVISORY COMMITTEE ON RULES FOR PUBLICATION OF COURT OF APPEAL OPINIONS, REPORT AND RECOMMENDATIONS (Nov. 2006).

should remain trans-substantive, a concern for doctrinal coherence might explain why. Lawmaking legitimacy plausibly counsels against substance-specificity, even at the state level, when the antecedent regime involved is statutory and thus made by the legislature. Confusion in the application and creation of process law might ensue were state courts to respect the trans-substantive norm in these instances, but then routinely craft substance-specific rules when the common law provides the antecedent regime.

Problems of legitimacy, competency, and coordination are hardly unique to the generation and maintenance of process law. All law that requires judicial elaboration suffers from these deficits. But responses abound in process law. They include, for example, the *Erie* Doctrine, the *Chevron* Doctrine, and a whole range of justiciability doctrines. The trans-substantivity principle, as a second-best, provides just one of many mechanisms that address judicial institutional limitations.

IV. IMPLICATIONS FOR DOCTRINAL DESIGN

Few proceduralists have defended trans-substantivity, at least in the abstract, as a principle of doctrinal design.[194] Particular substance-specific departures in actual doctrine, in contrast, have frequently provoked distress. The most notable substance-specific procedural rules have caused consternation,[195] scholars rail against exceptionalism in administrative doctrine,[196] and specific interpretive practices for particular statutes have drawn critical fire.[197] A gap divides theory from practice: trans-substantivity holds little generic appeal, but, to judge by the commentary, decision-makers departing from the norm keep getting it wrong.

This disarray in the literature on trans-substantivity reflects a striking limitation. This scholarship has not yet offered a general metric to judge substance-specific process law. In this Part, I use my institutional justification for the principle's persistence in judge-

194. In procedural commentary, the notable outliers are Paul Carrington and Geoffrey Hazard. Carrington, *Manifestly Unfounded Assertions*, *supra* note 165; Hazard, *Trans-Substantive Virtues*, *supra* note 73.

195. *See supra* notes 162–63 and accompanying text.

196. Levy & Glicksman, *supra* note 114, at 581.

197. Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 657–73 (2005) (arguing for an end to specialized interpretive practices for the antitrust statutes).

made process law to explain how and under what circumstances trans-substantivity should persist in doctrinal design. A court may craft a substance-specific process rule under circumstances that mitigate the harmful effect of the court's institutional limitations or when other institutions are even more poorly-situated to do the job. As a general matter,[198] when a court fashions a particular substance-specific rule, its desirability hinges in large measure on the goal the court believes the new rule serves. A court can most likely overcome its institutional limitations and properly craft a substance-specific rule when the court does so to enable the legal process to achieve the policy objectives in the antecedent regime more accurately.

My analysis also offers guidance for another problem of doctrinal design. As I described in Part I, process law is often articulated in trans-substantive terms but then lends itself to regularized patterns of substance-specific application. In some instances, this doctrine loses its trans-substantive character entirely and becomes unambiguously substance-specific. Trans-substantivity as justified by institutional considerations can inform the design of doctrine that fits at this position on the spectrum. The principle can help decision-makers craft trans-substantive rules such that these rules in application do not move in a substance-specific direction.

A. Court-Made Substance-Specific Process Law

Most arguments for substance-specific process law make first-best sorts of claims.[199] In one way or another, this advocacy asserts that the process for resolving disputes involving a particular antecedent regime will achieve better results with a substance-specific rule. Robert Cover engaged in this sort of analysis in his

198. On specialized courts and the wisdom of substance-specific doctrine they apply, see, for example, Rochelle Cooper Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 13–14 (1995) (commenting on the Federal Circuit's ability to create a coherent, and thus coordinated, body of law); Benjamin & Rai, *supra* note 12, at 313–16 (discussing the competency of the Federal Circuit to craft patent-specific administrative law); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 26–30 (1989).

199. *E.g.*, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, at 4 (April 15, 2009); Subrin, *Fudge Points*, *supra* note 13, at 45–56; Burbank & Subrin, *supra* note 119, at 412; Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1808–09 (1992); Resnik, *Failing Faith*, *supra* note 114, at 547–48.

article that coined the term "trans-substantive."[200] The first-best approach is incomplete, however, if it ignores the institutional setting in which the decision to deviate from the trans-substantive norm must be made. The second-best inquiry, informed by the justifications for trans-substantivity in the first place, asks whether circumstances are such that the court can overcome its institutional limitations and legitimately, competently, and effectively craft substance-specific doctrine. For generalist courts, when they can do so depends on the motivation for the substance-specific departure. I describe possible motivations for these departures first, then elaborate on my metric for substance-specific process law forged by courts.

1. Motivations for substance-specificity

a. Fidelity. A judge might be tempted to depart from the trans-substantive norm if a substance-specific process rule would help a legal process realize the policy objectives in the antecedent regime more completely. As I describe below, particularized class action doctrine for Title VII cases evolved in the 1970s for this reason, to achieve the statutes' broad remedial objectives more successfully.[201] Judges also might want to develop substance-specific process law to interfere with the realization of an antecedent regime. Doctrine specific to the litigation of Truth in Lending Act (TILA) claims, also described below, developed in the 1970s to absolve defendants from liability that courts found unattractive. Such departures either serve or undermine what I call "fidelity."

Process law pursues a fidelity goal when it steers decision-makers toward resolutions that best achieve the antecedent regime's objectives in light of the relevant factual circumstances. The goal particularly animates procedural and interpretive doctrine.[202]

200. Cover, *supra* note 11, at 732–35.

201. *See infra* notes 240–41 and accompanying text; *see also* Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868, 886 (1979).

202. Jeremy Bentham had something like fidelity in mind when he coined the term "adjective law" to describe procedural and evidentiary doctrine. IX JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE: SPECIALLY APPLIED TO ENGLISH PRACTICE 477 (1827) ("[T]he system of adjective law, is a means to an end. That end is, or ought to be, the execution of the commands issued, the fulfillment of the predictions delivered, of the engagements taken, by the system of substantive law."). Charles Clark did as well when he insisted that procedural doctrine serve as

Fidelity is not as dominant a goal in administrative law,[203] but core doctrine manifests its pull. If Congress delegates rulemaking power to an agency with instructions for its exercise, the agency acts arbitrarily and capriciously if it does not heed them.[204] A great deal of interpretive theory conceives of judges as legislative agents of one stripe or another, with obligations of faithfulness to legislative intent that the role requires.[205]

b. Institutional efficacy. Many substance-specific departures in process law—the standard the IRS uses to distinguish between legislative and interpretive rules, for example,[206] or the deference some courts withhold from EEOC interpretations of Title VII[207]—have little to do with fidelity, at least expressly. Some of this process law deviates from the trans-substantive norm to pursue goals of what I call "institutional efficacy." Perhaps federal courts should defer less to EEOC interpretations of Title VII than they otherwise would to an agency's statutory interpretation, for example, because judicial competence to craft antidiscrimination policy compares particularly favorably to the agency's.[208] Institutional efficacy is an

"a handmaid rather than [a] mistress" to "the work of justice." Clark, *Handmaid*, *supra* note 73, at 297; *see also* Charles E. Clark, *Methods of Legal Reform*, 36 W. VA. L. Q. 106, 111 (1929) ("Procedure is a tool, a means to an end and not an end in itself. That end is the application of rules of substantive law to the case in hand."). Legal economists include accuracy as one of two chief goals for a procedural regime. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 20.1, at 583 (7th ed. 2007). Lawrence Lessig uses the term "fidelity" to describe the "goal" of the interpretive enterprise. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1173 (1993) ("I take as given the judiciary's (at least feigned) commitment to fidelity [in textual interpretation] as its goal."); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1371 (1997) (explaining what "fidelity" means).

203. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975). Still, Paul Verkuil identifies the "accuracy of decisions" as a central objective for administrative procedure. Verkuil, *supra* note 77, at 279.

204. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

205. *E.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 113 (2010); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989); Daniel B. Rodriguez, Book Note, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 931 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1987)).

206. Hickman, *Agency-Specific Precedents*, *supra* note 118, at 101–03.

207. Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 54–55.

208. *Cf.* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1252 (2001) (making this suggestion for the Supreme Court).

umbrella category that covers a range of goals that relate to imperfections in or limitations of the institutions involved in legal processes. These goals include efficiency, optimal participation, reasoned deliberation, comparative institutional competence, and residual institutional legitimacy.

A number of scholars pair efficiency with fidelity as the twin goals procedural doctrine serves.[209] A host of doctrines pursue cost mitigation. Some, like expansive joinder rules, lower barriers to entry for legal processes, while others, like discovery limits and case management tools, provide mechanisms to protect against outcome distortions that the expense of litigation might produce. Concerns about inefficiencies in public administration have spurred various reforms, such as direct final rulemaking[210] and deadlines for agency adjudication.[211] Efficiency provides a normative yardstick for varieties of interpretive theory as well. Some textualists, for example, justify semantic canons of construction, such as *expressio unius est exclusio alterius*, as defaults that spare legislators the costs of having to anticipate all possible interpretive problems when they draft statutes.[212]

A variety of procedural and administrative doctrines attempt to optimize participation. These doctrines balance access by those affected by legal processes against harms caused by excessive or insufficient participation. Examples include the law of *res judicata* and notice-and-comment requirements for rulemaking. Doctrines that calibrate the degree to which participant preferences should dictate the outcomes of legal processes also fit into this sub-category. Rules regulating civil settlement in various contexts[213] and the doctrine governing negotiated rulemaking are illustrative.

209. *E.g.*, Verkuil, *supra* note 77, at 279–80; POSNER, *supra* note 202, § 21.1, at 593; Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1160 (2006).

210. *E.g.*, Guidance for FDA and Industry: Direct Final Rule Procedures, 62 Fed. Reg. 62466 (Feb. 21, 1997).

211. SCOTT SZYMENDERA, CONG. RESEARCH SERV., RL 33374, SOCIAL SECURITY DISABILITY INSURANCE (SSDI) AND SUPPLEMENTAL SECURITY INCOME (SSI): THE DISABILITY DETERMINATION AND APPEALS PROCESS 3–4 (2006).

212. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983). Another example from textualist interpretive theory is the argument that courts should not use legislative history because it is too time-consuming and burdensome to sift through. Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377.

213. *E.g.*, FED. R. CIV. P. 23(e).

Reasoned deliberation offers a taproot of legitimacy for public administration and civil litigation, two processes with tenuous connections to mechanisms for democratic accountability.[214] Consistent with this idea, a wide array of doctrines push decision-makers toward better quality decision-making. In administrative law, these include grand obligations, such as those imposed by the arbitrary-and-capricious standard for agency action.[215] They also encompass more granular requirements, such as the requirement that administrative law judges provide a reasoned decision to support their social security benefit determinations.[216] When judges act at the edge of their legitimate power in litigation, rules particularly encourage reasoned deliberation. Rule 23 for class certification decisions[217] and Rule 65 for the issuance of injunctive relief function in this manner.[218]

Doctrines frequently address concerns of comparative institutional competence and administrative burden and thereby respond to process problems that tax decision-makers' capacities to produce good resolutions. These doctrines reallocate decision-making authority from the comparatively incompetent institution to the better-equipped one,[219] relieve the decision-maker of authority altogether,[220] impose bright-line rules that deny decision-makers discretion when they might exercise it poorly,[221] and provide heuristics to assist decision-makers as they deal with particularly technical or otherwise demanding problems.[222]

Each of the foregoing institutional efficacy goals relates in some manner or another to the legitimacy of litigation and public

214. *E.g.*, Jerry L. Mashaw, *Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 19–24 (2001); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983).

215. MASHAW, *supra* note 63, at 24–25.

216. 42 U.S.C. § 405(b) (2006).

217. FED. R. CIV. P. 23; *e.g.*, Cortez v. Saia Motor Freight Line, Inc., 399 F. App'x 246 (9th Cir. 2010) (vacating a district court's denial of class certification on grounds that district court "fail[ed] to explain its reasons").

218. FED. R. CIV. P. 65(d)(1)(A).

219. *E.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference.").

220. Heckler v. Chaney, 470 U.S. 821, 837 (1985) (denying that courts could review an agency's refusal to take enforcement action).

221. *E.g.*, FED. R. CIV. P. 8.

222. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 658–59 (1992).

administration as legal processes. To the extent that these specific goals do not cover the landscape, residual institutional legitimacy, a catch-all goal, explains additional contours of process law. The avoidance canon is one example of a doctrine that does not quite fit elsewhere but certainly involves institutional efficacy. Aggressive judicial review might imperil the federal courts' legitimacy if unelected judges were to interfere with legislative outputs anytime they could find a colorable constitutional infirmity. The canon counsels courts to adopt a less natural reading of the statute and thereby dodge its invalidation. It helps keep judicial powder dry for cases that resist such finesse,[223] even if the canon steers decision-makers to a less faithful reading of the statute.[224]

My examples thus far show how process law responds to institutional limits and dysfunctions as they arise during legal processes. Sometimes process law pursues an institutional efficacy goal more indirectly, by encouraging decision-makers to make up for deficiencies in the institution that crafted the antecedent regime. A lot of statutory interpretation doctrine functions in this manner. Legislatures enact incomplete statutes for a variety of reasons, including the limits of human foresight and strategic ambiguity as a legislative tactic. Semantic canons of construction arguably address this institutional deficit by providing off-the-rack meaning to fill in the gaps.[225] Representation-reinforcing substantive canons work analogously. Politically marginalized groups that lack robust legislative representation sometimes benefit from canons that break interpretive ties in their favor.[226]

Fidelity and institutional efficacy are not the only goals process law serves. Fairness to affected persons and entities, for example, is another goal. The preceding discussion offers just an introduction to

223. *E.g.*, Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 401 (2005).

224. *E.g.*, Zadvydas v. Davis, 533 U.S. 678, 705 (2001) (Kennedy, J., dissenting); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 784 (1961) (Black, J., dissenting) (complaining that the Court's use of the avoidance doctrine was tantamount to rewriting the statute to say what Congress refused to say).

225. Eskridge & Frickey, *supra* note 163, at 66–67.

226. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 869 (2012); EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 168–87 (2008).

fidelity and institutional efficacy, enough to derive a normative metric for substance-specific process law that courts develop.

2. When should judge-made process law be substance-specific?

Fidelity and institutional efficacy often motivate the design of doctrines in process law, and they are therefore important to a metric to evaluate substance-specific departures. Courts can most likely overcome the institutional limitations I described in Part IV(b)(2) with pro-fidelity departures, or deviations from the trans-substantive norm undertaken to resolve a legal process in a way that more faithfully realizes the antecedent regime's objectives. These departures come in two varieties. The first variety of pro-fidelity departures occurs when the antecedent regime itself encodes a preference for substance-specificity; when courts craft a substance-specific rule for disputes involving the regime, they effectively implement implicit legislative will. In the late 1960s and early 1970s, the federal courts generally understood Title VII not as a device for the individualized remediation of discriminatory workplace episodes, but as a mandate for the reconfiguration of the American workplace in favor of protected classes.[227] This understanding of Title VII had a logical procedural corollary: to ensure judgments that actually implemented this objective, federal courts should do what they could to have Title VII cases proceed as class actions.[228] Courts heeded this latent procedural preference by developing several substance-specific applications of class action procedure that all-but-guaranteed the certification of broad Title VII classes.[229]

The second variety of pro-fidelity departures finds its justification in its effects, not implicit legislative will. The trans-substantive rule may not account for underlying conditions that systematically frustrate the realization of the antecedent regime's policy goals, making a substance-specific rule necessary. One of the

227. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969); *see also* Hutchings v. U.S. Indus., Inc., 428 F.2d 303, 310 (5th Cir. 1970); Evans v. Local Union 2127, Int'l Bhd. of Elec. Workers, 313 F. Supp. 1354, 1361 (N.D. Ga. 1969); Parham v. Sw. Bell Tel. Co., 433 F.2d 421, 428 (8th Cir. 1970); Jenkins v. United Gas Corp., 400 F.2d 28, 34 (5th Cir. 1968).

228. During debates over the 1972 amendments to Title VII, the latent congressional preference was made more explicit. *See* George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 716 (1980).

229. *See* David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 639–43 (2013).

examples Robert Cover offered in his famous treatment of trans-substantivity illustrates this point. A man left slaves to his legatees with the instruction that the slaves be freed once Virginia law permitted manumission. After the estate's executor had been discharged, Virginia law changed, but the legatees did not honor the testator's wishes. The Virginia Supreme Court of Appeals let the discharged executor sue to enforce the will's terms, even though the ordinary rule denied discharged executors standing to do so.[230] This law better realized the antecedent regime's policy objectives. Virginia law permitted manumission and privileged testator intent, policies that the unanticipated circumstances would have frustrated had the generic standing rule prevailed.

The institutional deficits that otherwise favor trans-substantivity in process law cause less trouble for pro-fidelity departures. To the extent that a court can connect its substance-specific rule to instructions encoded within the antecedent regime, or to the extent that a court neutralizes an obviously unforeseen impediment to the realization of the regime's goals, it derives the authority for its policymaking venture from legislative will. The danger of judicial usurpation of legislative prerogative lessens for that reason. The need to justify a substance-specific departure in terms of legislative will or preference protects at least partially against departures driven by the judge's bias or incompetent analysis. If evidence of this implicit legislative will is reasonably clear, it also provides a coordinating mechanism beyond the mere persuasiveness of the judge's reasoning to ensure that the departure achieves its intended goal.

For analogous reasons, anti-fidelity departures, or departures undertaken to frustrate the implementation of an antecedent regime, have the most tenuous claim to legitimacy. These departures result when the antecedent regime's accurate realization provokes judicial distaste. An example of this is the heightened pleading standards that judges forged for civil rights litigants starting in the 1960s.[231] Depending upon how one views it,[232] the judicial revolt against the

230. Cover, *supra* note 11, at 724.

231. *E.g.*, Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 471–73 (1986). For an early case, see *Valley v. Maule*, 297 F. Supp. 958, 960–61 (D. Conn. 1968).

232. Some courts justified their refusal to permit the certification of TILA claims by arguing that Congress did not intend such huge liabilities for debtors. *E.g.*, Kriger v. European

class certification of TILA cases might be another example.[233] TILA provides for statutory damages that creditors must pay all nominally-injured debtors. Claims brought for these damages fit the requirements for class certification perfectly. They do not require plaintiffs to prove individual causation or amount of injury, just the defendants' liability. In the 1970s, however, a number of district courts blanched at certifying TILA classes. They believed that class actions threatened defendants with aggregate liability in amounts that vastly exceeded any real culpability for wrongdoing.[234] Hence, these courts in effect wrote an exception for TILA claims into FRCP 23.

If the departure's relationship to fidelity can help determine whether the court surmounts its institutional deficits, then the goal can also help decide the wisdom of substance-specific departures motivated in the first instance by institutional efficacy. If these departures have pro-fidelity effects, they may be more proper. Those with anti-fidelity effects pose more difficulties. The district judges who rebelled against notice pleading in 1950s-era antitrust litigation did so chiefly on efficacy grounds.[235] The minimal pleading standard, they believed, opened the door in big antitrust cases to dispiritingly burdensome and inefficient discovery. But, the Second Circuit opined, these judges had no business privileging this concern over Congress's intent to rid the American marketplace of anticompetitive conduct.[236]

Substance-specific departures taken for institutional efficacy reasons pose the hardest evaluative problem when they have either uncertain fidelity effects or no fidelity effects at all. The canon that instructs judges to construe ambiguities in deportation statutes in favor of immigrants has no effect on the accuracy of cancellation of removal proceedings since the canon is supposed to apply only in

Health Spa, Inc., 56 F.R.D. 104, 106 (E.D. Wis. 1972).

233. *E.g.*, *In re* Toys "R" Us-Delaware, Inc.-Fair and Accurate Credit Transactions Act (FACTA) Litigation, No. 08-01980, 2010 WL 5071073 (C.D. Cal. Aug. 17, 2010) (discussing TILA cases); David Marcus, *From "Cases" to "Litigation" to "Contract": A Comment on Stability in Civil Procedure*, 56 ST. LOUIS U. L.J. 1231, 1250–51 (2012); *cf.* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954 (7th Cir. 2006) (suggesting that such denials of class certification are borne of the judge's dislike of the operation of the substantive law); Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 722 (9th Cir. 2010) (same).

234. Marcus, *supra* note 233, at 1250–51.

235. Dawson, *supra* note 81, at 431.

236. Nagler v. Admiral Corp., 248 F.2d 319, 326 (2d Cir. 1957).

instances of irreducible ambiguity in the INA.[237] Insofar as concerns for judicial efficiency motivated it,[238] the maturity requirement for class certification that evolved in mass tort litigation of the 1990s is another example.[239] The requirement emerged from the idea that a mass tort is "immature" until the litigation of individual lawsuits reveal the tort's legal and factual merit, as well as the central issues that determine any individual plaintiff's right to recover.[240] A few courts followed the lead of influential commentators and declined to grant class certification in cases involving so-called immature torts. Defenders of the maturity requirement insisted that it had a pro-fidelity effect: if courts certified immature torts, they argued, risk-averse defendants would settle without knowing if the payments reflected claim value.[241] Critics maintained that by thwarting class certification, the maturity requirement robbed plaintiffs' lawyers of badly-needed economies of scale, took away their incentives to invest in litigation, and thus prevented outcomes merited by the substantive law.[242]

Efficacy-driven departures from the trans-substantive norm, such as the maturity requirement or the pro-immigrant canon, are problematic, although less so than anti-fidelity departures. The problem of lawmaking legitimacy lessens because the departure either does nothing to interfere with legislative will (the pro-immigrant canon), or it has a plausible pro-fidelity effect (the maturity requirement). The problems of competence and bias remain, however, as the criticism greeting judicial use of the maturity requirement illustrates.[243] Also, the motivation for the departure lies with the court's own assessment of institutional need,

237. *E.g.*, Kane v. Winn, 319 F. Supp. 2d 162, 204 (D. Mass. 2004) (providing a particularly thorough discussion of this canon).

238. Castano v. Am. Tobacco Co., 84 F.3d 734, 749 (5th Cir. 1996).

239. For deployments of this requirement, see *id.*; *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297–98 (7th Cir. 1995); *Ball v. Union Carbide Corp.*, 212 F.R.D. 380, 389 (E.D. Tenn. 2002). For maturity as a substance-specific requirement, see *Janssen Pharm., Inc. v. Grant*, 873 So. 2d 100, 102 (Miss. 2004) (Diskinson, J., concurring) ("I see no justification for carving out an exception to the application of [Mississippi's permissive joinder rule] for 'mature torts.'").

240. *In re* Ethyl Corp., 975 S.W.2d 606, 610–11 (Tex. 1998).

241. *Rhone-Poulenc*, 51 F.3d at 1298.

242. David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons From a Special Master*, 69 B.U. L. REV. 695, 709–10 (1989).

243. *E.g.*, Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1424–28 (2003).

and nothing externally-fixed, such as implicit legislative will, coordinates decision-making.

Some substance-specific departures for institutional efficacy reasons may nonetheless fall within the judge's legitimate discretion. The questions are whether any other institution can respond better to the efficacy concern than the court can, and whether the efficacy problem is one that requires coordinated policymaking to solve. In other words, even if the court contemplating the departure suffers from institutional deficits, perhaps alternate institutions suffer from even worse deficits.

The pro-immigrant canon passes muster by the terms of this analysis. Immigrants with contested claims to remain in the United States have little voice politically. This particular disadvantage makes Congress a comparatively inferior institution to weigh the merits of the immigrant's cause. The disadvantage also lessens the legitimacy difficulties posed by judicial lawmaking. The pro-immigrant canon is a good example of one of Einer Elhauge's "preference-eliciting" default rules for statutory interpretation.[244] Immigrant underrepresentation makes a legislative response particularly likely, were Congress to recoil at judicial interpretations of the INA that favored immigrants too significantly.[245] The pro-immigrant canon also does not require coordinated policymaking to have its intended effect. When a court uses the canon to break an interpretive tie, it responds to the problem of under-representation as the problem affects the status of the immigrant involved in the particular removal proceedings. The fact that other courts do not also deploy the canon does not subtract from the benefit the canon yields when it does get used.

The comparative institutional analysis comes out differently for the maturity requirement. At least two alternative institutions plausibly could have generated the requirement as an amendment to Rule 23. The legislative dynamics favored the requirement's beneficiaries. Mass tort defendants had powerful congressional allies, and trial lawyers, an otherwise powerful political lobby, split over the wisdom of mass tort class actions.[246] Even had Congress been

244. *See generally* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002).

245. *Cf.* ELHAUGE, *supra* note 226, at 168–87 (2008) (discussing how courts can elicit the preferences of legislatures in cases involving politically underrepresented populations).

246. *E.g.*, David Marcus, The Creation and Renewal of the Class Action System, 1953–99,

hostile to coalitions that might have supported the requirement, the Federal Civil Rules Advisory Committee remained viable as a source. In fact, the committee seriously considered an amendment to Rule 23 that would have created a maturity requirement.[247] Absent evidence of legislative or rulemaking occlusion, other institutions could have undertaken the substance-specific departure. Moreover, at least in the 1990s when the requirement emerged, the coordination problem was a real one. One court could deploy the maturity requirement to deny class certification only to have another jurisdiction's court ignore the requirement and grant class certification. The alleged harm that motivated the first court's use of the requirement would thus result.[248]

B. Trans-Substantivity and the Slide Toward Substance-Specificity

Trans-substantivity, conceived of as a "second-best" motivated by institutional limitations, also has implications for the choice between rules and standards in the design of process law. In Part I, I distinguished between process law that is unambiguously substance-specific, such as the securities-specific pleading standard, and process law that is articulated in trans-substantive terms but lends itself to regularized patterns of substance-specific application. An example of the latter is the *Mead* metric for determining when courts should use *Chevron* to assess agency interpretations of statutes. I observed that rules in this category can harden into unambiguously substance-specific doctrine once an authoritative decision-maker acts.[249]

This second category of process law creates a problem that resembles the challenge that substance-specific process law poses. A court might apply a trans-substantive rule in a substance-specific way because it believes that the costs of trans-substantivity for the antecedent regime at issue outweigh the principle's benefits. Legitimacy, competency, and coordination problems may distort this determination, just as they confound judicial decisions to craft

at 76–77 (unpublished manuscript) (on file with the author).

247. *Id.* at 99.

248. *Cf. In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 134 F.3d 133 (3d Cir. 1998) (describing the federal judiciary's inability to enjoin a state court's decision to grant class certification that came on the heels of the federal court's decision not to do so in a mass torts case).

249. *See infra* notes 54–55 and accompanying text.

unambiguously substance-specific law. A number of commentators, for example, have complained that the federal courts treat EEOC interpretations of the Americans with Disabilities Act (ADA) with particular skepticism. This judicial hostility may conflict with congressional intent for the amount of deference the EEOC's interpretations should enjoy.[250] The particular aggressiveness with which the federal courts have applied the nominally trans-substantive summary judgment standard in antidiscrimination cases might reflect the influence of bias at a conscious or subconscious level.[251]

The prospect of poorly-applied process law should inform how rulemakers devise trans-substantive rules. When a process doctrine can plausibly take the form of a rule or a standard, the institutional justifications for trans-substantivity counsel in favor of a rule. A judge has to do more work to apply a trans-substantive rule in a substance-specific way based upon his or her perceptions that a particular antecedent regime would benefit from particularized treatment. To do so, the judge has to announce an unambiguously substance-specific exception, rather than cloak the particularized application in the flexible generalities of a trans-substantive standard. Authoritative decision-makers can thereby better police these deviations from the trans-substantive norm. For at least fifty years, an understanding of the federal pleading threshold that couched the threshold in terms of a rule prevailed. During this period, the Supreme Court rebuffed efforts several times to raise the threshold for particular categories of claims.[252] The pleading threshold softened into a standard in 2007, and as applied it may have a disparate impact on particular categories of claims.[253] Given the standard's slippery language, authoritative decision-makers will

250. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1950–51 (2006); Colker, *supra* note 169, at 160. *See generally* Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 7 (2007) (commenting on the Supreme Court's hostility to the anti-subordination intent of the Americans with Disabilities Act).

251. *E.g.*, Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 710–12 (2007).

252. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 511 (2002); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 162 (1993).

253. *E.g.*, Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235 (2012).

likely have more difficulty keeping it from sliding toward substance-specificity in application.

V. CONCLUSION

For a long time, academic discussion of trans-substantivity has proceeded almost entirely within the narrow world of procedural commentary. The principle became identified with the Federal Rules of Civil Procedure. The Federal Rules are sacred to many a proceduralist, and the principle thus assumed somewhat of a mythical status. But trans-substantivity is not just a principle for the design of procedural doctrine, and it certainly is not something sacrosanct. Trans-substantivity is a prudential principle, one that reflects and responds to the imperfections of institutions involved in the processes of American law. As long as these imperfections remain, the justification for trans-substantivity's persistence does as well.